

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

_____	x
UNITED STATES OF AMERICA,	: Criminal Action
	:
Plaintiff,	: No. 2:21-cr-00127
	:
v.	:
	:
RAYMOND DUGAN,	:
	:
Defendant.	: APPEAL TRANSCRIPT
_____	x

VOLUME I
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JOSEPH R. GOODWIN
UNITED STATES DISTRICT COURT JUDGE
IN CHARLESTON, WEST VIRGINIA
AUGUST 2, 2022

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Proceedings recorded by mechanical stenography; transcript
produced by computer.

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1 PROCEEDINGS had before The Honorable Joseph R.
2 Goodwin, Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 August 2, 2022, at 8:50, as follows:

5 THE COURT: Good morning.

6 THE COURTROOM DEPUTY CLERK: The matter before the
7 Court is *The United States of America v. Raymond Dugan*,
8 Criminal Action No. 2:21-cr-127.

9 THE COURT: Is the United States ready?

10 MS. WHITE: We are, Your Honor.

11 THE COURT: Is the defendant ready?

12 MR. SCHLES: Yes, Your Honor.

13 THE COURT: Have you had an opportunity to review
14 the proposed preliminary instructions and the voir dire as I
15 plan to give it?

16 MS. WHITE: Yes, sir.

17 MR. SCHLES: We have, Your Honor.

18 THE COURT: Any objections?

19 MS. WHITE: No, sir.

20 MR. SCHLES: Your Honor, we previously, in writing
21 on the forms, had a couple of minor corrections. Assuming
22 those have been taken care of, no.

23 THE COURT: Do you want to look and see?

24 MR. SCHLES: I'm sorry?

25 THE COURT: Would you look and see?

1 THE LAW CLERK: I can print them out and give it
2 to them.

3 THE COURT: Please.

4 We'll take care of it right now.

5 While we're waiting for her to print that out for you
6 to take a look at, the only motion pending is the motion in
7 limine with regard to the videotape; is that correct?

8 MR. SCHLES: That is correct, Your Honor.

9 THE COURT: I'm going to wait and rule on that at
10 the time that it's offered at trial.

11 In the meantime, I direct the parties not to mention it
12 in opening statement or discuss it prior to the time it's
13 offered.

14 MS. WHITE: Yes, Your Honor.

15 MR. SCHLES: Would you like me to go ahead, Your
16 Honor?

17 THE COURT: You can say whatever you want, yeah.

18 MR. SCHLES: On the motion in limine, it's fairly
19 basic application of the hearsay and relevance rules. The
20 part that I specifically object to concerns Mr. Dugan's wife
21 asking the question whether that they're there to look for
22 child pornography; getting an answer in the affirmative from
23 one of the agents, which would be hearsay. That's a
24 statement offered for the truth of the matter asserted. And
25 then Ms. Dugan's reaction. She becomes upset and hysterical

1 and leaves the room heaving and sobbing.

2 Your Honor, that has no relevance. It has no tendency
3 to make any matter -- material matter at issue in the case
4 more or less likely. And it is in my opinion highly
5 inflammatory, in two ways highly prejudicial and fairly
6 prejudicial because, first, the impression could be left
7 with the jurors that Ms. Dugan was previously suspecting the
8 use of child pornography by my client when I don't think
9 that is a fair statement at all.

10 And, also, just her reaction and how upset she was is
11 going to turn the jury against my client because he's
12 accused of doing something that caused his wife such severe
13 distress and I think it is not relevant.

14 The law enforcement's response is hearsay. And even if
15 there is some slight probative value, Your Honor, it's
16 substantially outweighed by the danger of unfair prejudice
17 and confusing and misleading the jury.

18 MS. WHITE: Thank you, Your Honor.

19 We provided a copy of the video excerpt to the Court --

20 THE COURT: I've seen it.

21 MS. WHITE: -- so I won't belabor the facts.

22 It's our position first that Mrs. Dugan asked a
23 question, which does not fall within the definition of
24 statement for the rule.

25 The answer, which is provided by law enforcement, the

1 affirmative yes, is offered not for the truth of the matter,
2 but offered to provide context for the ensuing conversation
3 on the video.

4 That's the only time during that video excerpt that the
5 words child pornography are used. So for the jury to have
6 the proper context for what the conversation that follows is
7 discussing, they have to hear that exchange.

8 THE COURT: How would you use her statement in
9 closing argument?

10 MS. WHITE: We don't intend to reference her
11 statement at all in closing.

12 THE COURT: Well, then, what important fact is it
13 offered to prove?

14 MS. WHITE: It's offered to provide context in
15 that the defendant's comments made after that initial
16 exchange are all discussing child pornography and the only
17 time the words child pornography are mentioned to establish
18 that context is during her question.

19 We simply want the jury to hear the fact that everyone
20 in the room thought they were discussing child pornography
21 when the defendant made his inculpatory statements after
22 that exchange.

23 MR. SCHLES: Your Honor, that can be simply
24 accomplished with Ms. White answering -- asking a
25 preliminary question to Agent Fleener:

1 Were you questioning Mr. Dugan about the investigation
2 into child pornography?

3 Yes.

4 And then play the clip from approximately 15:40 rather
5 than 14 minutes. And it has everything that Mr. -- we're
6 not arguing that Mr. Dugan's statements are not either
7 statements of a party opponent or adoptive admissions, but
8 his words are admissible and the questions to him provide
9 the context, but it is certainly not necessary to show the
10 wife's question or the answer or her hysterical reaction.
11 It's done to inflame the jury. I mean, it couldn't be much
12 more obvious that out of the whole 18-minute tape they pick
13 up right when that happens.

14 THE COURT: Try again.

15 MS. WHITE: Well, Your Honor, that happens because
16 that's when the conversation ensues about why the police are
17 there. The issue is there's a portion at the beginning of
18 the excerpt and the whole rest of the excerpt. And
19 Mr. Schles respectfully is telling the Court we could simply
20 start the tape later. Well, no, because before this happens
21 the defendant is seen on the tape reading the search
22 warrant. He throws the papers on the ground. He throws his
23 glasses on the ground. And at one point he says I'm sure
24 this is me on that tape. And then the conversation happens.
25 A very brief exchange with the wife and the police officer

1 to establish the context for all of the listeners and then
2 the conversation ensues.

3 Certainly it's the --

4 THE COURT: What if there was a Greek chorus in
5 the living room, and we get to that point in the tape and
6 the Greek chorus chimes in hang him, hang him, hang him, and
7 he reacts badly to that suggestion?

8 Would that come in?

9 MS. WHITE: Would the Greek chorus?

10 THE COURT: Yeah, because he reacts so badly to
11 it. Hang him for child pornography, hang him for child
12 pornography.

13 MS. WHITE: Yeah, the government wouldn't offer
14 that into evidence.

15 THE COURT: Why not?

16 MS. WHITE: We know better than that.

17 THE COURT: What's the difference?

18 MS. WHITE: That's prejudicial asking for death
19 and arguing the penalty.

20 In this case the comment --

21 THE COURT: Convict him for child pornography,
22 convict him for child pornography.

23 MS. WHITE: Uh-huh.

24 THE COURT: What about that from the chorus?

25 MS. WHITE: Well, Your Honor, I don't think that

1 the government's allowed to elicit evidence during the trial
2 of an opinion of whether the defendant is guilty or not, so
3 that's different than establishing the context of what the
4 conversation is.

5 THE COURT: Okay. I'll still wait until the time
6 you offer it. I'm dubious.

7 MS. WHITE: Thank you, Your Honor.

8 If the Court does decide to remove that excerpt, would
9 it --

10 THE COURT: Yeah, you ought to go ahead and
11 prepare the tape just to remove her question.

12 MS. WHITE: Yes, Your Honor.

13 Would it be permissible to the Court that we simply
14 have the tape go silent during those 20 seconds, but
15 continue to play, so there's no issue of splicing it?

16 MR. SCHLES: I don't think the visual depiction
17 fits within what my objection is.

18 I would be satisfied with the silence during that.

19 MS. WHITE: Thank you, Your Honor.

20 So if -- just to make this trial as simple as possible,
21 the government will agree that we'll play the first portion
22 of the tape. We'll make her question and answer silent.
23 And I will ask a question to the witness eliciting what the
24 topic was during that portion and then we'll play the
25 remaining portion of the tape.

1 THE COURT: That sounds like a good resolution to
2 the problem for me.

3 Is that satisfactory to the defendant?

4 MR. SCHLES: That is satisfactory, Your Honor.

5 THE COURT: That will be --

6 MR. SCHLES: Just to clarify that the sound should
7 not come on until Mrs. Dugan has visually left the room.
8 She can be heard during the rest of the time from a
9 different room, but we can't flush that out and I just have
10 to accept that.

11 MS. WHITE: Well, Your Honor --

12 THE COURT: If there's any other -- I'm going to
13 take out her statement.

14 MS. WHITE: Yes.

15 THE COURT: I'm not going to try to edit it
16 further than that. I'll silence that.

17 MS. WHITE: Thank you, Your Honor.

18 THE COURT: Her question was --

19 MR. SCHLES: Thank you, Your Honor.

20 MS. WHITE: We'll remove the question and answer
21 and we'll make that silent.

22 Thank you, sir.

23 THE COURT: Very well.

24 Well, that's good.

25 How long do you need for opening? I usually don't ask

1 that, but I'm in a good mood.

2 MS. WHITE: No more than ten minutes, Your Honor.

3 THE COURT: Is that all right with you,
4 Mr. Schles?

5 MR. SCHLES: That would be sufficient, Your Honor.

6 THE COURT: All right. We're waiting for jurors.
7 We've been fairly lucky during COVID to be able to get
8 jurors, but we're -- this morning we're short or right on
9 the cusp, so it may be a few minutes.

10 I'm going to recess court. If you want to step
11 outside, just let Robin know exactly where you're going to
12 be and have a phone number and we'll call you.

13 MR. SCHLES: We won't be any further than the
14 hallway, Your Honor.

15 MS. WHITE: Thank you, Your Honor.

16 We'll just go downstairs to check that audio on the
17 video to make sure it plays appropriately for the jury.

18 THE COURT: Sounds good. The Court stands in
19 recess.

20 And the courtroom deputy has the papers for you -- I
21 mean, the law clerk.

22 (Recess taken from 9:00 a.m. until 9:37 a.m.)

23 (Whereupon, jury selection was conducted after which
24 the following occurred:)

25

1 THE COURT: You may be seated.

2 Ladies and gentlemen of the jury, now that you've been
3 sworn I'll give you some preliminary instructions to guide
4 your participation in this trial.

5 You are now judges of the facts. It is your job to
6 determine what those facts are. I'll give you more lengthy
7 and full instructions at the end of the trial, but you must
8 decide the case based solely on the facts as you find them
9 and the law as I give it to you.

10 You must decide it based on the evidence. Evidence is
11 the testimony of witnesses from the witness stand, which is
12 now in the middle of the courtroom for COVID reasons -- it
13 will be right there at the podium -- exhibits, stipulations
14 or agreements between the parties as to the existence of a
15 fact and those matters of which I take judicial notice. Any
16 of those things happen, I'll explain it to you at the time
17 it occurs.

18 The following are not evidence. The indictment, as I
19 previously told you, is not evidence. It's a formal method
20 of accusing a defendant of a crime in order to bring that
21 defendant to trial. My statements and rulings are not
22 evidence. The attorneys' statements, arguments, questions
23 and objections and any evidence that I order stricken are
24 not evidence and may not be considered by you. If there's
25 an objection made to a question, I'll rule on that

1 objection. If I sustain the objection, ignore the question.
2 If I overrule the objection, treat the question and answer
3 just the same as you would any other question or answer in
4 the case.

5 In other words, try to ignore the judging and the
6 lawyer and listen to the witnesses and review the evidence
7 as it comes in.

8 You should consider the evidence in this case in the
9 same way you would consider evidence in making any very
10 important decision in your life. Feel free to use your
11 common sense. Feel free to draw reasonable conclusions
12 based on your common experience.

13 Some of you have heard the terms direct evidence and
14 circumstantial evidence. Feel free to use either one.
15 Direct evidence might be if I were standing in a house, I
16 looked out the window and it was snowing outside. It would
17 be direct evidence that it's snowing. It would be
18 circumstantial evidence that it's somewhat cold out there.
19 You don't have to make those distinctions. Just consider
20 both and give it just such weight as you believe it
21 deserves.

22 Consider any evidence which I admit for a limited
23 purpose, and I'll tell you if I do that, only for that
24 purpose.

25 You must presume this defendant not guilty. The

1 presumption of innocence alone is enough to acquit the
2 defendant.

3 The government has the burden of proving the
4 defendant's guilt beyond a reasonable doubt. Unless the
5 government proves beyond a reasonable doubt that the
6 defendant committed each and every element of the crime
7 charged, you must find the defendant not guilty of that
8 charge. The burden never shifts to the defendant. The
9 defendant does not have any duty or burden of calling
10 witnesses or presenting evidence. If in your view the
11 evidence reasonably permits two conclusions, one consistent
12 with innocence and one consistent with guilt, you must adopt
13 the conclusion consistent with innocence.

14 The defendant in a criminal case has an absolute right
15 under the Constitution not to testify. If a defendant
16 decides to exercise his constitutional right not to testify,
17 you must not discuss or consider that fact.

18 I'm going to give you detailed instructions at the end,
19 as I said, but I'm going to give you a brief summary of what
20 the government must prove to make its case.

21 The superseding indictment in this case charges the
22 defendant, Raymond Dugan, with accessing with intent to view
23 images and videos containing child pornography in violation
24 of 18 United States Code Section 2252A(a) (5) (B) and
25 2252A(b) (2) .

1 2252A(a) (5) (B) states in pertinent part: Any person
2 who knowingly possesses or knowingly accesses with intent to
3 view any material that contains an image of child
4 pornography that has been shipped or transported in or
5 affecting interstate or foreign commerce by any means,
6 including by computer, or that was produced using materials
7 that have been mailed or shipped or transported in or
8 affecting interstate commerce or foreign commerce by any
9 means, including by computer, shall be guilty of a crime
10 against the United States.

11 The superseding indictment in this case charges between
12 on or about January 30th, 2019, and on or about
13 November 4th, 2019, at or near Logan, Logan County, West
14 Virginia, and within the Southern District of West Virginia,
15 defendant Raymond Dugan did knowingly access with intent to
16 view material, that is computer graphic image files
17 containing images and videos of child pornography, as
18 defined in 18 United States Code Section 2256(8) (A), that
19 involved prepubescent minors and which had been shipped and
20 transported in and affecting interstate and foreign commerce
21 by any means, including by computer.

22 To sustain its burden of proof, the government must
23 prove the following three essential elements beyond a
24 reasonable doubt:

25 One, that this defendant possessed or accessed with

1 intent to view any material that contained an image of child
2 pornography involving a prepubescent minor.

3 Two, that the graphic image file images had been
4 transported in or affecting interstate or foreign commerce
5 by any means, including by computer, or was produced using
6 materials that had been transported in or affecting
7 interstate commerce by any means, including computer.

8 And, three, that the defendant acted knowingly.

9 To act knowingly means to do an act voluntarily and
10 intentionally and not because of a mistake or accident or
11 other innocent reason. In other words, the government must
12 prove that the defendant knew the visual depiction was an
13 image of prepubescent child pornography.

14 Child pornography means any visual depiction where the
15 production of such visual depiction involves the use of a
16 minor engaged in sexually explicit conduct. Such visual
17 depiction is a digital image, computer image or computer
18 generated image that is or is indistinguishable from that of
19 a minor engaging sexually -- engaging in sexually explicit
20 conduct or such visual depiction has been created, adopted
21 or modified to appear that an identifiable minor is engaging
22 in sexually explicit conduct.

23 Sexually explicit conduct means actual or simulated
24 sexual intercourse, including genital-genital, oral-genital,
25 anal-genital or oral-anal, whether between persons of the

1 same or opposite sex, bestiality, masturbation, sadistic or
2 masochistic abuse, or lascivious exhibition of the genitals
3 or pubic area of any person.

4 An identifiable minor is a person who was a minor at
5 the time the visual depiction was created, adapted or
6 modified -- adopted or modified and whose image as a minor
7 was used in creating, adopting or modifying the visual
8 depiction; and who is recognizable as an actual person by
9 the person's face, likeness and other distinguishing
10 characteristics, such as a unique birthmark or other
11 recognizable feature; and shall not be construed to require
12 proof of the actual identity of the identifiable minor.

13 The jury must determine, based on all the evidence,
14 whether a reasonable viewer would consider the depiction to
15 be of an actual minor. The jury may look to the manner in
16 which the image was marketed to determine whether it is
17 prohibited material.

18 The government has alleged that the images at issue
19 here involve a prepubescent minor. Under this law a
20 prepubescent minor is one under the age of 12. The
21 government does not need to establish the exact age of the
22 child in the image, nor does it need to prove the identity
23 of the child in the image. You may determine that a person
24 is under the age of 12 based on the relevant images.

25 Finally, I want to talk to you about your conduct as

1 jurors.

2 Do not discuss this case with anyone or permit anyone
3 to discuss the case with you or in your presence. If anyone
4 tries to talk to you about the case, notify me.

5 Do not read any news stories, articles or listen to any
6 radio or television reports about the case or about anyone
7 who has anything to do with the case. Don't do any research
8 or investigation on your own.

9 I used to worry that we'd try car wreck cases and the
10 jury would go out to the scene of the wreck and look around.

11 Everything you're allowed to consider will be presented
12 right here in the courtroom. You may not go on your
13 computer and do searches or acquire information or get books
14 out and look them up or call somebody because you're not
15 allowed to do any of that.

16 I'm going to allow you to take notes. We'll put
17 notepads out for you after you come back after a break. I
18 want to tell you about the notes. They're to help you.
19 They're not the court reporter's official record. They are
20 simply notes to help you. You can use them to aid your
21 discussion with your fellow jurors, but just because you've
22 got it in your notes doesn't mean that somebody else that
23 doesn't have it is right or wrong or that you're right or
24 wrong.

25 You get the drift?

1 Keep the doors to the jury room shut when possible.

2 (Sidebar discussion held with defendant present.)

3 THE COURT: Can you hear me?

4 Any objections to the instructions as given?

5 MS. WHITE: No, sir.

6 MR. SCHLES: No, Your Honor.

7 THE COURT: All right. Are we ready to proceed?

8 MS. WHITE: Yes, sir.

9 THE COURT: All right. Thank you.

10 (End of discussion at sidebar.)

11 THE COURT: We're getting fancy. It used to be we
12 would have to have the attorneys approach the bench and take
13 a break. And then we developed this pink noise or whatever
14 it's called so you couldn't hear the things you weren't
15 supposed to hear. And now we have these fancy headphones
16 and the pink noise.

17 When we're doing this, don't listen. Talk among
18 yourselves or don't pay attention to us.

19 I'm going to tell you what happens next. Actually,
20 what happens next is we're going to take a morning break,
21 but after that the government may make an opening statement.
22 That is simply a preview of what they believe the evidence
23 in the case will be. It's not argument, but it is designed
24 to help you understand the evidence as it comes in.

25 The defendant has the opportunity to make an opening

1 statement, but, like I explained to you, the defendant has
2 no obligation to present anything. It is solely the
3 government's burden in this case. If they make an opening
4 statement, then, again, the same rules apply. They're going
5 to preview what they think the evidence will be to help
6 guide your deliberations.

7 Next, after opening statements, we'll begin with the
8 government's witnesses. They have the burden of proof, so
9 they get to go first and last. They will call their
10 witnesses, examine them. Then, after they finish with the
11 examination of a witness, if the defendant wants to, the
12 defendant may cross-examine that witness. If they do, then
13 because the government gets to go first and last, the
14 government can take more questions on redirect.

15 Now, we'll go like that until the government is
16 finished with their witnesses and exhibits and so forth.

17 At the end of that we'll take a short break and then
18 we'll be back. And at that point the defendant will decide
19 whether they want to call any witnesses or present any
20 evidence. Again, they have absolutely no obligation to do
21 that. And if so, the same procedure will apply.

22 At the end of the evidence we'll take another break,
23 not terribly long, and then you'll come back. You'll hear
24 the final arguments of the lawyers.

25 The government will make an opening. This is where

1 they get to tell you what they think that the evidence
2 showed. They get to argue their case to tell you what they
3 believe was proved and how it was proved.

4 Again, when the government finishes, the defendant may
5 have his lawyer stand up and make a closing argument to tell
6 you why he believes the government failed and what he
7 believes the government -- or that the evidence has or has
8 not shown.

9 After that, because the government gets to go first and
10 last, they get a brief period to rebut the defendant's
11 argument if the defendant has chosen to make one.

12 After that I then give you the instructions, much like
13 the ones I just gave you now. After that you will retire to
14 the jury room to consider of your verdict. I will explain
15 your duties in that regard at the end of the trial. Suffice
16 it so say you're judges of the facts. You will decide. You
17 are the jury and you will decide this case. Your verdict
18 must be unanimous. You-all must agree.

19 Any objections, counsel?

20 MS. WHITE: No, Your Honor.

21 Thank you.

22 MR. SCHLES: No, Your Honor.

23 THE COURT: At this time we'll take our morning
24 break. Usually we'll take it earlier than this.

25 Our general schedule, if we go forward to another day,

1 is we'll take a 15-minute break midmorning, an hour and
2 15 minutes for lunch, 15 minutes in the afternoon for a
3 break. And we'll go to 5:00 or as soon thereafter as it's
4 reasonable to interrupt the flow of the evidence.

5 Remember this, when you go home tonight, people are
6 going to be very curious as to what you've been up to. Oh,
7 you're on a jury? What's it about? What kind of case are
8 you on? Tell them that there's a very old and very mean
9 federal judge who's told you you cannot say what kind of
10 case you're on or tell them anything about it. And that
11 goes for everybody, including your spouse and your children,
12 so forth.

13 You also might tell them you're not going to be able to
14 let them know if someday you're late getting home because
15 you're still in deliberations and have decided to stay past
16 5:00, so they'll be prepared for your disappearance into The
17 Twilight Zone.

18 After the trial is over and you've rendered your
19 verdict and you've been excused, you are permitted to
20 discuss the case. My practical advice to you is don't. It
21 doesn't do any good. It can just stir up things, but it's
22 entirely up to you.

23 Now, having all that out of the way, everybody
24 understand where we're headed?

25 All right. The court security officer will show you

1 into your jury room. It's not huge, but I think you'll feel
2 reasonably safe. We have another one of those air handlers
3 like that one there that cleans the air as best we can and
4 we have or should have some food and coffee.

5 So we'll take about a 15-minute break and then we'll
6 hear the opening statements of counsel.

7 All rise for the jury.

8 (Jury out at 10:53 a.m.)

9 THE COURT: Counsel, do you need anything?
10 Court's in recess.

11 (Recess taken from 10:53 a.m. until 11:14 a.m.)

12 THE COURT: Good morning.

13 Government, you may open.

14 MS. WHITE: Thank you, Your Honor.

15 May I use the podium this morning?

16 THE COURT: You certainly may.

17 MS. WHITE: Thank you.

18 Good morning, ladies and gentlemen. Can everyone hear
19 me?

20 Okay. We're here today because the defendant in this
21 case, Raymond Dugan, decided to go on the dark web and look
22 at child pornography.

23 Now, if you're looking for child pornography, these
24 days you have to put in some effort. So if you or I went to
25 Google or Internet Explorer and we typed in child

1 pornography, you'd find some articles about child
2 pornography, you'd find some studies, maybe some press
3 releases, stories, but what you wouldn't find are pictures
4 and videos of actual children being abused, being sexually
5 degraded. You wouldn't find that on Google. So if you're
6 looking for it, you've gotta go a little further and one
7 place folks go is the dark web.

8 Now, in this case the defendant in this case admitted
9 to going on the dark web. Now, to get on the dark web, you
10 have to install an application or a portal to get to the
11 dark web.

12 In this case the defendant told police that he
13 installed the Tor browser. The Tor browser stands for The
14 Onion Router. So once you install that application, you
15 click on it and it gives you access to the dark web.

16 And the dark web is like a different version of the
17 internet. It's a little -- a little more private, a little
18 more anonymous, and it has a lot of child pornography on it.

19 So if you're looking for child pornography, you might
20 do what the defendant in this case did, go on the Tor
21 browser to access the dark web and look at child
22 pornography.

23 Now, you'll hear testimony today from a forensic
24 analyst, Corporal Robert Boggs, and he will tell you that he
25 looked at some of the electronic devices in the Dugan home.

1 And specifically he analyzed the hard drive from a laptop
2 that was found in the defendant's home office.

3 He will tell you what he found, that that hard drive
4 had the Tor browser on it being used from January through
5 November of 2019 and that .onion or -- or Tor websites were
6 visited over 1,500 times. And finally he will tell you that
7 he was able to recover from the unallocated space of the
8 defendant's hard drive over 1,200 images of child
9 pornography.

10 So you'll have that evidence to consider at the end of
11 this trial, but you'll also have the evidence of the
12 defendant's own words.

13 When the Department of Homeland Security executed a
14 search warrant at the Dugan home in June of 2020, they had
15 an opportunity to talk to Mr. Dugan, the defendant. And as
16 soon as he found out why the police were there, he said I
17 probably did it. My life is over. She's gonna kill me,
18 talking about his wife.

19 So he then had an opportunity to sit down with
20 Agent Fleener. He was given his rights and agreed to give a
21 statement. And you'll hear the defendant, in his own words,
22 admit to installing the Tor browser, admit to using it to
23 access the dark web -- excuse me -- the dark web. You'll
24 hear the defendant in his own words say, I went from website
25 to website clicking from one to another looking at child

1 pornography.

2 Now, he draws a clear distinction, the defendant. He
3 didn't download any child pornography, but he admits that he
4 was looking. And that, ladies and gentlemen, is what he's
5 charged with, accessing with intent to view child
6 pornography.

7 So in this case the government needs to prove a couple
8 of things. By the end of this case, we need to show you
9 that the defendant in this case accessed with his intent to
10 view child pornography, that the children in some of those
11 images are under the age of 12, that the defendant knowingly
12 accessed the pictures and videos, and, finally, that some
13 part of his actions involved interstate or foreign commerce.

14 So we'll work backwards through the elements.

15 Number four: Interstate or foreign commerce.

16 That one's pretty easy in this case because we all
17 agree. During the trial I'll read you a stipulation that
18 the government and the defendant and his attorney have
19 entered into. We all agree that the interstate and foreign
20 commerce element is met, so you can check that box pretty
21 quickly.

22 The next one is that the defendant knew what he was
23 doing. And numbers one and two kind of go together, that he
24 looked at the child pornography and that he knew that's what
25 he was looking for. And the evidence from that will come

1 directly out of his own mouth:

2 I was looking for it. I went from website to website.
3 I spent several months on the dark web looking for child
4 pornography.

5 You'll hear those words on the tape in the defendant's
6 own voice.

7 Now, the last element is that the children in these
8 images are under the age of 12. Prepubescent is the legal
9 term. That means you're going to have to look at some
10 pictures. You will not have to look at all 1,237 images.
11 I'm going to show you a handful in a way that's as painless
12 as I can possibly make it, but when you look at those images
13 that we have selected, you will have no question that these
14 children are little, under the age of 12, some by far, and
15 you'll check that final box.

16 When you finish all of the evidence, we'll get to come
17 back to you one more time and summarize it for you.

18 We're here today, and we'll come back to you later,
19 because the defendant in this case was curious. Curiosity
20 got me is the last question he has on the tape for you.
21 Curiosity got me and it put me in a bad spot.

22 Yes, it did, ladies and gentlemen. Curiosity to the
23 tune of 1,237 images carved out of the defendant's hard
24 drive, pulled out of the unallocated space, recovered, after
25 he spent nine months on the dark web looking for child

1 pornography.

2 When we come back to you, after you've heard the
3 defendant's words and you've heard the testimony of the
4 agent and the forensic analyst, you'll have no trouble doing
5 what we ask of you and that is checking the guilty box.

6 Thank you.

7 THE COURT: Mr. Schles.

8 MR. SCHLES: Thank you, Your Honor.

9 Good morning. I am David Schles and I am Ray Dugan's
10 attorney. And we are here today. My client has denied the
11 allegations and he is here and we are putting the government
12 to its proof.

13 Ms. White just told you in her own words what she
14 thinks the government will prove. I'm asking you and
15 Mr. Dugan is asking you to listen to the actual evidence,
16 don't start from their version. They're trying to condition
17 you to accept the evidence the way they want you to view it.

18 She just claimed to have quoted Mr. Dugan. You are
19 going to hear Mr. Dugan. The interview was recorded. When
20 you listen to it, ask yourself do you hear Mr. Dugan say I
21 was looking for it? It, child porn, anything. He didn't
22 say that. You won't hear him say I was looking for it.
23 They want you to assume he was looking for it.

24 They also want you to assume that when you go on the
25 dark web that you have to have some sort of specialized

1 knowledge and search for it. They aren't going to prove
2 that either. The dark web is different than what I'm going
3 to call the regular internet. You do need specialized
4 software to access it, but it acts just like the regular
5 internet once you're inside it and using the software.

6 We've all been on the internet. You were asked before
7 and everybody at least to some degree is familiar with
8 surfing the internet.

9 You do not need to type URLs or the names of websites
10 or links and sites. They're going to make it sound like you
11 have to know the exact combinations of letters and numbers
12 to type in order to be directed to a particular website.

13 You will find out that's not true. Just like on any
14 other internet, you Googled something, you do a search, you
15 go to one website. On that website there's going to be
16 links to multiple other websites. There are links to
17 advertisements. There are pop ups. There are embedded in
18 the text of articles, you know, hyperlinks where you just
19 click on a link and it will take you to another one.

20 Everybody, I would assume, at some point in their life
21 using the internet has ended up on a website that either
22 they didn't intend to ever visit or once they found out what
23 it was they didn't do anything. I'm not interested in this
24 and they went away.

25 The government is claiming knowledge and intent and

1 they are not going to prove it.

2 We do not deny that there were images found in what
3 they're calling the unallocated space. What that actually
4 is is your computer has system files or hidden files. Some
5 of them are what are called thumbs databases where the
6 computer itself creates files and shortcuts and stores them
7 in what are hidden files.

8 When you open up what -- your file directory structure
9 on the internet, you see I have the file for -- like at my
10 office, I have my client files and then each individual file
11 individual client has a subfile and within the client's
12 subfiles there are different directories with different
13 categories and things and you sit there and you create them.

14 I create a file for John Smith. I create a file for
15 John Smith evidence file, John Smith legal research file,
16 all these things.

17 And that's so -- why is it? So I know where they are
18 and I can find them and I can go back to them and use them,
19 look at them. That's the whole purpose of doing that.

20 You're going to find out that isn't the way Mr. Dugan's
21 hard drive was at all. These were not visible. They
22 weren't organized. They hadn't been by any human hand, let
23 alone Mr. Dugan, placed into these files. They are found in
24 hidden system files buried in the operating system of his
25 computer.

1 They are not going to prove that he looked at them.
2 They're not going to prove that he knew they were there.

3 They will be able to show that the computer that we're
4 talking about -- and it's an Acer laptop. And it's got a
5 serial number, but I'm not going to bore you with that --
6 did have images in the drive that were recovered that
7 contained child pornography. We're not disputing that
8 portion of it.

9 What we are disputing is that Mr. Dugan knowingly
10 accessed child pornography with the intent to view it.

11 The government has made some bold claims, very bold
12 claims, but you're going to see the actual evidence. You're
13 going to hear his actual words. You're going to hear from
14 the -- and you are going to hear that the government is
15 overselling this. They are not going to be able to prove
16 knowledge or intent in terms of access or viewing. And the
17 mere presence of these images in hidden system files is not
18 sufficient to convict a person. It's simply not the crime
19 with which he has been charged.

20 When you listen to all the evidence and think about it
21 and discuss it among yourselves and ask yourselves did the
22 government prove what they claimed they proved? Did they
23 prove intentional knowing access with the intent to view
24 child pornography?

25 You are going to come to the conclusion that not only

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1 is there reasonable doubt, but they didn't prove it or even
2 come close. And I will ask you at the appropriate time at
3 the end of the trial to acquit my client and I am confident
4 that you will.

5 Thank you very much.

6 THE COURT: Call your first witness.

7 MS. WHITE: Your Honor, the government would call
8 Special Agent Michael Fleener.

9 THE WITNESS: Sir, am I allowed to bring this
10 over?

11 THE COURT: You may.

12 THE WITNESS: Thank you, sir.

13 **SPECIAL AGENT MICHAEL FLEENER, GOVERNMENT WITNESS, SWORN**

14 **DIRECT EXAMINATION**

15 THE COURT: Pull that microphone, close if you
16 would.

17 THE WITNESS: Yes, sir.

18 BY MS. WHITE:

19 **Q.** Agent Fleener, good morning.

20 **A.** Good morning, ma'am.

21 **Q.** Could you state your full name and your former employer
22 for the record, please?

23 **A.** My full name is Michael Fleener. I was formally
24 employed by Homeland Security Investigations with the
25 Department of Homeland Security.

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1 Q. And how long did you work for Homeland Security?

2 A. Just over 21 years.

3 Q. What made you leave?

4 A. I retired, ma'am.

5 Q. And when did you retire?

6 A. May 31st of this year.

7 Q. So during the course of this case?

8 A. Absolutely, yes, ma'am.

9 Q. What was your role with the Department of Homeland
10 Security when you were working there?

11 A. I was a criminal investigator assigned all programatic
12 areas of the Department of Homeland Security and its legacy
13 agency the United States Custom Service.

14 Those duties included drug smuggling; money laundering;
15 what we call counterproliferation of American technology,
16 weaponry and data; human smuggling; human trafficking; and
17 cyber investigations, more specifically child pornography,
18 what some people call child sexual abuse material.

19 That actually encompassed about 95 percent of all my
20 caseloads.

21 Q. Thank you. So you focused a lot of attention --

22 A. Yes, ma'am.

23 Q. -- on child exploitation?

24 A. Yes, ma'am, that is correct.

25 Q. Could you tell the ladies and gentlemen of the jury

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1 what training you had?

2 **A.** Absolutely. Beginning in 2001 at the United States
3 Customs Academy in Georgia I received approximately 32 hours
4 of basic child pornography investigative training.

5 Once I got out into the field and permanently assigned
6 in the Philadelphia office, I was assigned to a smuggling
7 group. And at that time all child pornography
8 investigations came through the smuggling group because it
9 crossed the borders of the United States. It's been that
10 way for decades. So because I was in smuggling group, I
11 received specialized more advanced training in child
12 exploitation investigations to include online technical
13 skills, cyber investigations training, what's known as
14 peer-to-peer investigation.

15 Peer-to-peer is basically two computers working
16 together and communicating directly. It would be, perfect
17 example, you text somebody an image of your grandkid. That
18 is a peer-to-peer, you know, straight network of computers.

19 I received training as a forensic interviewer in child
20 exploitation cases. I received training as a crisis
21 negotiator, what people would call hostage negotiations
22 specifically for my responding to child exploitation
23 investigations. I've attended five week-long seminars in
24 Dallas put on by the Internet Crimes Against Child Task
25 Forces, which ranged anywhere from 32 to 40 hours each of

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1 advanced training, and cell phone training -- forensic cell
2 phone training through West Virginia State Police, the
3 Marshall Laboratory down in Huntington.

4 And probably 95 percent of all my career, the 21
5 career, has been focused on child exploitation
6 investigations. I think I -- without counting --
7 approximately 200 cases of my career of child exploitation.

8 **Q.** Were you involved in the investigation into a man by
9 the name of Raymond Dugan?

10 **A.** Yes, ma'am, I was.

11 **Q.** Do you see him in the courtroom?

12 **A.** Yes, ma'am. He's sitting right there, ma'am.

13 **Q.** Could you tell the ladies and gentlemen of the jury the
14 color of his tie?

15 **A.** Yellow tie, blue shirt, gray suit coat.

16 MS. WHITE: Your Honor, if we could let the record
17 reflect the witness has identified the defendant.

18 THE COURT: The record may so reflect.

19 MS. WHITE: Thank you.

20 BY MS. WHITE:

21 **Q.** Now, were you involved in obtaining a search warrant
22 related to child pornography with respect to the Dugan
23 residence?

24 **A.** Yes, ma'am, I was.

25 **Q.** Okay. And did you write the search warrant?

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1 **A.** I wrote the affidavit for the search warrant, yes,
2 ma'am.

3 **Q.** And were you a part of the team that executed the
4 search warrant?

5 **A.** Yes, ma'am, I was.

6 **Q.** When did you execute that warrant?

7 **A.** June 11th, 2020.

8 **Q.** Okay. And that was done on Lewis Lawson Branch Road in
9 Logan?

10 **A.** Yes, ma'am, it was.

11 **Q.** Now, when you executed that search warrant, did you go
12 in, knock the door down and take a team of SWAT officers
13 with you, or how did you go about that in this case?

14 **A.** We did what we refer to as a very soft entry. We
15 basically -- as tactically sound as we need to be for our
16 safety, basically just up to the front door with a warrant
17 in hand and knock on the door.

18 **Q.** Okay. Now, who did you expect to find in the home?

19 **A.** I was aware living at the time was Mr. Dugan, his wife
20 Eleanor Dugan and they have an adult child by the name of
21 Tyler Dugan.

22 **Q.** Okay. When you got there on June 11th of 2020, who was
23 present that morning?

24 **A.** I believe all three of them.

25 **Q.** Okay.

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1 **A.** If memory serves correct.

2 **Q.** Now, during the course of your execution of the search
3 warrant, did you have authority to seize items?

4 **A.** Yes, ma'am, I did.

5 **Q.** What did you seize?

6 **A.** What did I seize?

7 **Q.** What was seized?

8 **A.** A total of 17 items I believe encompassing hard drives,
9 thumb drives, cell phones, iPads. I believe that's pretty
10 much it.

11 **Q.** And what were you looking for?

12 **A.** Evidence of the Tor network and child pornography.

13 MS. WHITE: Your Honor, may I approach the
14 witness?

15 THE COURT: You may.

16 BY MS. WHITE:

17 **Q.** Agent Fleener, I'm going to show you what's been marked
18 as Government's Exhibit Number 1.

19 Do you recognize this item?

20 **A.** I do, ma'am.

21 **Q.** What is it?

22 **A.** It is an audio/video recording of our entry during the
23 search warrant.

24 **Q.** So you made a small video clip of when you got to the
25 home?

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1 **A.** Actually, it was recorded by Trooper Boggs, I believe.

2 **Q.** Your team?

3 **A.** Yes, ma'am.

4 **Q.** Have you had an opportunity to review the clip that's
5 contained on Exhibit 1?

6 **A.** I have.

7 **Q.** Does that fairly and accurately depict what happened at
8 the residence that morning?

9 **A.** Yes, ma'am, it does.

10 **Q.** And it does contain a small silent portion?

11 **A.** It does.

12 MS. WHITE: We'd offer Government's Exhibit
13 Number 1 into evidence and ask to publish it to the jury.

14 THE COURT: It may be done.

15 **GOVERNMENT EXHIBIT NUMBER 1 ADMITTED**

16 MR. SCHLES: No objection, Your Honor.

17 MS. WHITE: Thank you, Your Honor.

18 (Video played.)

19 BY MS. WHITE:

20 **Q.** Now, Agent, you just saw a couple of people come across
21 the screen.

22 Who is the woman who is pictured on the screen right
23 now?

24 **A.** That was Eleanor Dugan.

25 **Q.** And there was a young man who preceded her on the

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1 screen wearing a green T-shirt.

2 Who is that?

3 **A.** That would be the adult son, Tyler Dugan.

4 **Q.** And the third person on the screen that came by?

5 **A.** It would be Mr. Dugan.

6 **Q.** Okay. Thank you.

7 MR. SCHLES: Objection, Your Honor.

8 THE COURT: Very well. Can I have you on the
9 headphones.

10 All right. This is the point you talk among
11 yourselves.

12 (Sidebar discussion held with defendant present.)

13 THE COURT: All right, Mr. Schles.

14 MR. SCHLES: Your Honor, my understanding is that
15 the portion with Ms. Dugan's words would be muted. I could
16 hear that.

17 MS. WHITE: Your Honor, we provided the tape and
18 allowed Mr. Schles to review it in the redacted form
19 pursuant to our agreement before court. And this is exactly
20 what he viewed and just admitted into evidence without
21 objection.

22 MR. SCHLES: Your Honor, what I viewed and
23 listened to, after our earlier hearing and the Court's
24 ruling, it did not include audio of Ms. Dugan speaking.

25 MS. WHITE: She didn't speak on the tape, Your

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1 Honor. We redacted the portion in question. It hasn't come
2 up on the screen yet because we haven't allowed it to play
3 that far.

4 THE COURT: I think I just heard an "oh" or
5 something like that.

6 Is that all I heard?

7 It was only supposed to have muted her question.
8 That's what I understood the agreement was.

9 MS. WHITE: That's correct, Your Honor. We did
10 that from second 41 through minute 1:16 to cover her
11 question, the answer, and her ensuing response.

12 We've provided that to Mr. Schles and he watched it
13 during the recess.

14 THE COURT: All right. Overruled. You may
15 proceed.

16 MS. WHITE: Thank you, Your Honor.

17 MR. SCHLES: Thank you.

18 (End of discussion at sidebar.)

19 (Video played.)

20 BY MS. WHITE:

21 **Q.** Now, during this time where it's silent, Agent, was
22 there a question and answer that established the topic for
23 which you were there?

24 **A.** Yes, ma'am, there was.

25 **Q.** What was it?

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1 **A.** After Mr. Dugan's comment right there about I probably
2 used it, the Tor network, Mrs. Dugan asked --

3 **Q.** Now, hold on just a second. Let me stop you there.

4 It was established that you're there on child
5 pornography, correct?

6 **A.** Yes, ma'am.

7 **Q.** Okay. And then what -- what did the defendant just
8 have in his -- on his leg that he brushed off?

9 **A.** That was a copy of the search warrant that we gave him.

10 MS. WHITE: Okay. Could we just back that up and
11 play it just one more time, please? Just about ten seconds.

12 (Video played.)

13 BY MS. WHITE:

14 **Q.** Agent Fleener, on that clip the defendant points
15 backwards over his head.

16 What -- what was the room he pointed to?

17 **A.** His home office.

18 **Q.** Okay. Now, you had an opportunity to interview
19 Mr. Dugan separately; is that correct?

20 **A.** That is correct, ma'am.

21 MS. WHITE: Your Honor, may I approach the
22 witness?

23 THE COURT: You may.

24 BY MS. WHITE:

25 **Q.** First I'm going to show you what's been marked

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1 Government's Exhibit 2A through 2E.

2 Do you recognize that?

3 **A.** Yes, ma'am, I do.

4 **Q.** What is that?

5 **A.** That is a recording of my interview with Mr. Dugan.

6 **Q.** Is there clips from the recording?

7 **A.** Yes, sir -- or yes, ma'am.

8 MS. WHITE: Your Honor, we'd offer Government's
9 Exhibit 2A through E into evidence.

10 MR. SCHLES: No objection, Your Honor.

11 THE COURT: The exhibits may be admitted.

12 **GOVERNMENT EXHIBIT NOS. 2A - 2E ADMITTED**

13 MS. WHITE: Thank you, Your Honor.

14 BY MS. WHITE:

15 **Q.** And I'm also showing you a stack of paper that's
16 labeled 2F through 2I.

17 Could you tell the ladies and gentlemen of the grand
18 jury what these are?

19 **A.** These are transcripts of sections of that interview.

20 **Q.** Do you believe that those transcripts would aid the
21 jury in listening to the defendant's statement?

22 **A.** I do, ma'am.

23 MS. WHITE: Your Honor, we would ask permission to
24 publish the transcript along with the audio for the jury at
25 this time.

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1 THE COURT: Mr. Schles?

2 MR. SCHLES: No objection, Your Honor.

3 THE COURT: Ladies and gentlemen, the transcripts
4 are simply an aid. The exhibits themselves are the evidence
5 in the case. You may use the transcripts, but use your own
6 faculties, hearings, to determine what is said on the tape.

7 MS. WHITE: Thank you, Your Honor.

8 THE COURT: You may proceed.

9 (Video played.)

10 BY MS. WHITE:

11 **Q.** Agent Fleener, there's a second clip; is that correct?

12 **A.** Yes, ma'am.

13 **Q.** Okay.

14 (Video played.)

15 MS. WHITE: There's a third clip.

16 (Video played.)

17 MS. WHITE: And clip number four; is that correct?

18 (Video played.)

19 MS. WHITE: Thank you.

20 BY MS. WHITE:

21 **Q.** Agent Fleener, in the course of your career, have you
22 interviewed suspects on a regular basis?

23 **A.** Yes, ma'am, I have.

24 **Q.** Is it common in your experience for suspects to hedge?

25 **A.** Yes, it is.

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1 Q. What does that mean?

2 A. I would say it means they're softening their guilt.

3 Q. When you were meeting with the defendant in this case,
4 did you have that same feeling?

5 A. Yes.

6 MR. SCHLES: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MS. WHITE:

9 Q. Could you tell the ladies and gentlemen of the grand
10 jury what the Tor network is?

11 A. Absolutely, I can. I think it would be best, if you
12 don't mind, if I also explain kind of how the internet
13 works --

14 Q. Okay.

15 A. -- in general.

16 The internet -- obviously everyone knows what that
17 is -- is a global network of servers and computers all tied
18 together to share in the knowledge, hence the www worldwide
19 web.

20 When you connect to the internet on a device, all
21 devices that connect to an internet -- to the internet have
22 an IP address. That's how a requesting computer that goes
23 online to go to a website identifies itself to the
24 responding website so the responding website knows where to
25 send that information back to, such as your banking website.

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1 So your IP address identifies that device you're on as,
2 hey, I need information. Please give it to me. It's very
3 similar to a phone number in your cell phone. It links to
4 you.

5 All activity on the internet starts out what I would
6 call the surface internet, the visible internet. If you
7 want to think of an iceberg, okay, you got this tip sticking
8 out over the water. That's the surface web or the surface
9 internet. That's where when you plug in your computer and
10 you say open up Google Chrome or Internet Explorer, you get
11 a web page. That's on the surface internet. Websites such
12 that end in .com, .org are on the surface internet as well.
13 The surface internet accounts for probably only 5 percent
14 all internet activity.

15 Underneath the water surface, the rest of that massive
16 iceberg encompasses two different internets. There's what's
17 called the deep internet and then the dark internet or dark
18 web. Some people use that interchangeably, but that would
19 not be correct. It's the deep internet and the dark web.

20 Now, the deep internet sounds scary, but we've all
21 been on it. Everybody uses it. Those are sites such as
22 your banking institution, such as statistical and data sites
23 that -- say you want to find an old relative. You go in and
24 put their name and date of birth. Sites that require you to
25 log in with a password and your user name. So your Macy's

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1 account or Amazon account, all that is encompassed in the
2 deep web.

3 And at the very bottom of that iceberg is the dark web.
4 Now, the dark web is not accessible by regular internet
5 means.

6 Ms. White alluded in her opening statement you have to
7 have a specialized browser to get to the dark web. One such
8 browser -- I believe it's one of the original -- is the Tor
9 network, which, as she said, stands for The Onion Router.

10 Now, when you download that, it allows you to go down
11 to the dark web. And kind of similar to how the regular
12 internet works how it's all connected with computers and
13 servers, the dark web works that way, but they're all
14 running the Tor network.

15 So when you get on the dark web and you want to use the
16 Tor network and you say, okay, take me to this website,
17 you're going to go through a series of computers kind of
18 like links in a chain. They're called circuits. And you're
19 going to go to this computer and it's going to send you to
20 that computer and it's going to send you to the website
21 you're after. And it will follow a similar path back to
22 your computer so you can view or get whatever information
23 you're trying to get.

24 Now, as I mentioned earlier, when you're on the
25 internet, you have an IP address, the internet protocol

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1 address, and it kind of tells everybody where to send
2 information back to so everybody's talking to the right
3 people and you get what you want.

4 The Tor works a little differently because every time
5 you go through a different computer in that chain, your
6 internet IP doesn't change, but every link in that chain
7 only sees the previous IP address requesting the
8 information. That's where the anonymity is supposed to
9 derive from because each computer in the chain hides the
10 previous computer's address and so forth.

11 Amongst the Tor network not only are the computers on
12 the network voluntary, anybody who is downloading Tor and
13 running it agrees to let their computer be an access point
14 through the Tor network and to the dark web, but the servers
15 that are specifically located on the dark web are also
16 running things like the Tor network and encryption that
17 hides their IP addresses as well.

18 So basically in short that's what the Tor network is.

19 **Q.** Okay. So when you went to the house that day and
20 executed this search warrant, you knew that someone there
21 had been using the Tor network?

22 **A.** Yes, ma'am, I did.

23 **Q.** And what, if anything, did you think they were using
24 the Tor network to do?

25 **A.** To access illicit materials, specifically child

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1 pornography.

2 **Q.** Okay. And you said that you did find a number of
3 electronics in the residence that day; is that right?

4 **A.** That is correct, ma'am.

5 **Q.** Did you seize every single piece of electronics?

6 **A.** No, ma'am, we did not.

7 **Q.** How did you decide what to take and what to leave
8 behind?

9 **A.** Specifically when it came to, for example, Mrs. Dugan's
10 cell phone or Tyler Dugan's cell phone, as with all cases we
11 did a brief overview of what was contained -- with their
12 permission what was contained on their cell phones looking
13 for any evidence of illicit activity or the Tor network. It
14 became immediately clear quickly that their cell phones had
15 nothing illicit on them so they were able to keep those.

16 **Q.** Okay. So did you seize any electronics belonging to
17 Mrs. Dugan?

18 **A.** No, ma'am.

19 **Q.** Did you seize any electronics belonging to Tyler Dugan,
20 the son?

21 **A.** Not that I'm aware of, no, ma'am.

22 **Q.** And why not?

23 **A.** Because they had nothing illegal on them at the time.

24 **Q.** When you previewed the electronics in the defendant's
25 home office, did you make the decision to seize anything out

Special Agent Michael Fleener - Direct (White)

1 of that room?

2 **A.** Yes, ma'am, we did.

3 **Q.** Why?

4 **A.** They showed evidence of the Tor network and child
5 pornography at the time.

6 **Q.** And when I say did you seize anything, what does that
7 mean?

8 **A.** To take physical control of it and take it for further
9 forensic analysis at a lab.

10 **Q.** And who did the full forensic analysis in this case?

11 **A.** Corporal Robert Boggs.

12 **Q.** Okay. And did you have an opportunity to review the
13 images that Corporal Boggs found on the hard drive in the
14 defendant's office?

15 **A.** I did, ma'am, yes.

16 **Q.** And did you find any relevant material?

17 **A.** Yes, I did, ma'am.

18 **Q.** What did you find?

19 **A.** It was over 1,200 images of child pornography.

20 MS. WHITE: Okay. Your Honor, may I approach?

21 THE COURT: Yes.

22 Would this be a good time to break?

23 MS. WHITE: Well, Your Honor, it's a good time to
24 break or I can show the images and then we'll be done with
25 this witness, whichever the Court prefers.

Special Agent Michael Fleener - Direct (White)

1 THE COURT: All right. Let's go ahead then.

2 MS. WHITE: Your Honor, if I may approach the
3 witness.

4 THE COURT: You may.

5 BY MS. WHITE:

6 **Q.** Agent Fleener, could you tell the ladies and gentlemen
7 of the grand jury what's been marked as Government's
8 Exhibit --

9 THE COURT: They're not the grand jury, but I
10 know --

11 MS. WHITE: I'm sorry. I apologize. The jurors.

12 **A.** That's a CD containing child pornography images.

13 BY MS. WHITE:

14 **Q.** Is that a full and accurate depiction of what was found
15 on the defendant's hard drive that day?

16 **A.** Yes, ma'am, it is.

17 MS. WHITE: We'd offer Exhibit Number 9 into
18 evidence under seal pursuant to the court order, Your Honor.

19 **GOVERNMENT EXHIBIT NUMBER 9 ADMITTED UNDER SEAL**

20 MR. SCHLES: No objection.

21 THE COURT: I'm sorry?

22 MR. SCHLES: No objection, Your Honor.

23 THE COURT: It may be received. It will only be
24 sealed after it's viewed by the jury in open court.

25 MS. WHITE: Thank you, Your Honor.

Special Agent Michael Fleener - Direct (White)

1 We do not intend to publish that full CD at this point.
2 We selected Exhibits 3 through 6, if I could publish them at
3 this time.

4 THE COURT: You may, and the exhibit may be
5 received.

6 The jury may, of course, since it's in evidence, review
7 it at the time of their deliberations.

8 MS. WHITE: Thank you, Your Honor.

9 THE COURT: And then it will be sealed as part of
10 the record.

11 MS. WHITE: Thank you, sir.

12 BY MS. WHITE:

13 Q. Agent Fleener, I'm showing you four manilla envelopes.
14 They're marked Exhibits 3, 4, 5 and 6.

15 Do you recognize those documents?

16 A. I do, ma'am.

17 Q. Do you know what they are?

18 A. Yes, ma'am, I do.

19 Q. Could you tell the ladies and gentlemen just briefly
20 what materials are contained in them?

21 A. Four specific examples or images of prepubescent
22 children and explicitly sexual conduct.

23 Q. Where were those images recovered from?

24 A. Mr. Dugan's hard drive from his laptop.

25 MS. WHITE: With permission of the clerk, we would

Special Agent Michael Fleener - Direct (White)

1 publish these briefly to the jury when she's ready.

2 THE COURT: It may be done.

3 MS. WHITE: And, Your Honor, we'd move Exhibits 3
4 through 6 into evidence at this time.

5 THE COURT: Without objection it may be received.

6 **GOVERNMENT EXHIBIT NUMBERS 3 - 6 ADMITTED UNDER SEAL**

7 MS. WHITE: Thank you.

8 THE COURT: I said without objection it may be
9 received.

10 MS. WHITE: Yes, thank you.

11 THE COURTROOM DEPUTY CLERK: We're ready, yes.

12 BY MS. WHITE:

13 **Q.** Exhibit 3. That's Exhibit 3, correct?

14 **A.** Yes, ma'am. I'm sorry.

15 **Q.** Next I'll publish Exhibit 4.

16 **A.** Yes, ma'am.

17 **Q.** We'll publish Exhibit 5.

18 **A.** Yes, ma'am.

19 **Q.** And finally Exhibit 6.

20 **A.** Yes, ma'am.

21 MS. WHITE: Thank you, Your Honor.

22 BY MS. WHITE:

23 **Q.** Agent Fleener, you said that those four images, along
24 with the 1,200 other images on Exhibit 9, where did they
25 come from?

Special Agent Michael Fleener - Direct (White)

1 **A.** From the hard drive that was located within Mr. Dugan's
2 laptop.

3 **Q.** In his home office?

4 **A.** In his home office.

5 MS. WHITE: Thank you.

6 THE COURT: And that is the material contained on
7 Exhibit --

8 MS. WHITE: Exhibit -- uh-huh. I'm sorry.

9 THE COURT: Are all of these individual pictures
10 contained on that disc that you introduced as Exhibit
11 whatever the number --

12 THE COURTROOM DEPUTY CLERK: Nine.

13 MS. WHITE: Exhibit 9. Those four images as well
14 as the 1,200 images from the defendant's computer are on
15 Exhibit 9.

16 THE COURT: Very well.

17 MS. WHITE: We chose to only publish four to the
18 jury.

19 THE COURT: Okay. I want to explain to the jury
20 all the images on the disc are evidence in the case.

21 MS. WHITE: Thank you, Your Honor.

22 I have no further questions of this witness.

23 THE COURT: All right.

24 Let's -- Mr. Schles, should we take our lunch break
25 before we cross-examination or would you prefer to do it

Special Agent Michael Fleener - Cross (Schles)

1 now?

2 MR. SCHLES: Lunch break would be fine, Your
3 Honor.

4 THE COURT: All right.

5 Ladies and gentlemen, we'll take an hour and 15 minutes
6 for lunch. And by my calculations that ought to make it
7 around 1:22 or 3. Try to get back two or three minutes
8 early so we can start on time. Have a nice lunch.

9 Very important, don't discuss the case or anything
10 about it among yourselves or permit anyone to discuss it
11 with you or in your presence. Don't do any research, don't
12 use any social media at any time during your duties as
13 jurors. Don't use Facebook, Twitter or any of the social
14 media platforms. I'll see you back here at 1:22.

15 (Recess taken from 12:07 p.m. until 1:24 p.m.)

16 THE COURT: Good afternoon.

17 Cross-examine.

18 MR. SCHLES: Thank you, Your Honor.

19 **CROSS-EXAMINATION**

20 BY MR. SCHLES:

21 **Q.** Mr. Fleener, it's not illegal to download and install
22 the Tor browser, is it?

23 **A.** That in itself, no.

24 **Q.** I'm sorry?

25 **A.** That in itself isn't unusual. People do it.

Special Agent Michael Fleener - Cross (Schles)

1 **Q.** And it's also not illegal to access the dark web using
2 the Tor browser in and of itself, is it?

3 **A.** No, sir.

4 **Q.** And on I guess it was June 11th of 2020, you were the
5 lead agent when the search of Mr. Dugan's residence was
6 conducted?

7 **A.** Yes, sir, that's correct.

8 **Q.** So you are familiar with the items that were examined
9 and searched on that day?

10 **A.** Yes, sir, I was.

11 **Q.** Was there an HP Pavilion G series computer?

12 **A.** If it's on that sheet, then that would be correct.

13 **Q.** And there was no images of child pornography found on
14 that device, was there?

15 **A.** Ultimately, no.

16 **Q.** There was also an iPad model A1430. I don't know
17 exactly what the model means. You also examined that.
18 There was no child pornography found on that device?

19 **A.** Correct, after forensics, yes.

20 **Q.** There was an HTC cell phone, correct?

21 **A.** Yes, sir.

22 **Q.** No child pornography found on that, correct?

23 **A.** I don't believe so, no, sir.

24 **Q.** In the kitchen there was an iPhone 8 and an iPhone 7
25 Plus model.

Special Agent Michael Fleener - Cross (Schles)

1 There was no child pornography found on either of those
2 devices, correct?

3 **A.** That's correct, sir.

4 **Q.** Then in Mr. Dugan's home office, which was visible on
5 the video -- that was the room through the double glass
6 doors?

7 **A.** Yes, sir.

8 **Q.** There was another iPad model A 1430 in that one,
9 correct?

10 **A.** Yes, sir.

11 **Q.** There was no child pornography on that?

12 **A.** No, sir.

13 **Q.** There was also in the home office an Amazon Kindle,
14 correct?

15 **A.** I believe so, sir, yes.

16 **Q.** Nothing illegal on that, correct?

17 **A.** That's correct, sir.

18 **Q.** Also in the home office there was a Toshiba hard drive
19 250 gigabyte?

20 **A.** I'm assuming so if it's on that paper, sir, yes.

21 **Q.** Would it help if I showed you this or --

22 **A.** Well, you're welcome to. I just can't remember by make
23 and model all the items --

24 **Q.** I understand.

25 **A.** -- that were at the house.

Special Agent Michael Fleener - Cross (Schles)

1 Q. There was no child pornography found on that computer?

2 A. No, sir.

3 Q. There was another Toshiba HD hard drive found also in
4 the home office. Also no child pornography on that device?

5 A. No, sir.

6 Q. There was also a Western Digital 120 gigabyte hard
7 drive found in the home office, correct?

8 A. Correct, sir.

9 Q. No -- no child pornography on that either?

10 A. Correct, sir.

11 Q. Also there was a Seagate hard drive 40 gigabyte also
12 found in the home office, correct?

13 A. Yes, sir.

14 Q. And as with the other ones we discussed there was no
15 child pornography on that?

16 A. No, sir.

17 Q. Also in the home office there were eight thumb drives
18 found.

19 There's not a more detailed description here, but am I
20 correct in stating that there was no child pornography found
21 on any of those thumb drives?

22 A. That would be correct, sir.

23 Q. There was also in the home office a micro SD card. And
24 am I correct in saying there was no child pornography on
25 that device?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** Yes, sir.

2 **Q.** There were ten SD cards, which I guess are a little
3 bigger than micro SD cards, and those were also clean of any
4 child pornography, correct?

5 **A.** Correct, sir.

6 **Q.** There was also an HD-120 RadioShack tape which could be
7 used as a storage device, correct?

8 **A.** Yes, sir.

9 **Q.** Also no child pornography, correct?

10 **A.** No, sir.

11 **Q.** Also there were three just DVDs.

12 There were no videos or images of child pornography on
13 any of those, correct?

14 **A.** That's correct, sir.

15 **Q.** And then in Room O, which I believe is an upstairs
16 bedroom, there was a Toshiba hard drive found and that also
17 had nothing on it?

18 **A.** Correct, sir.

19 **Q.** The one device that you say you did find images on
20 was -- and you described it by the hard drive PNY 240
21 gigabyte hard drive, but that hard drive was in an Acer
22 laptop?

23 **A.** Yes, sir, I believe so.

24 **Q.** And that's the only device out of the 20-some there
25 that contained any illicit images?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** Yes, sir.

2 **Q.** And did you review the hard drive on that Acer laptop?

3 **A.** That was reviewed by Robert Boggs, sir, not me.

4 **Q.** I'm sorry?

5 **A.** At the time of the search warrant Corporal Boggs was
6 viewing that and not me.

7 **Q.** You did not check on that hard drive for anything?

8 **A.** After the interview with him, sir, I stopped by the
9 room and asked how it was going. And Robert Boggs says, you
10 know, this has child porn on it.

11 **Q.** So you have no firsthand knowledge what might have been
12 found on that Acer laptop?

13 **A.** Not during the search warrant, correct.

14 **Q.** Not during the search warrant?

15 **A.** Yes.

16 **Q.** You did not turn on the computer or if it was already
17 on look at it and touch any of the buttons on the keyboard?

18 **A.** No, all that was going on while I was interviewing
19 Mr. Dugan.

20 **Q.** And that was conducted by Boggs from the State
21 Police -- West Virginia State Police?

22 **A.** Yes, sir.

23 **Q.** And to your knowledge the only evidence relevant to
24 this case was found on that one Acer laptop, correct?

25 **A.** That is correct, sir.

Special Agent Michael Fleener - Cross (Schles)

1 **Q.** And can you tell me how you came to suspect somebody at
2 the Dugan residence of having accessed child pornography?

3 **A.** Yes, sir, I can. Our agent -- our office up in Boston,
4 Massachusetts, with the --

5 **Q.** When you say your office, would you --

6 **A.** Correct. The HSI office -- the Special Agent in Charge
7 office of HSI in Boston, Massachusetts, was working jointly
8 with and assisting a foreign law enforcement agency
9 conducting an ongoing investigation.

10 **Q.** So somebody who works -- you don't know who worked
11 for -- but at the time you were in the same agency obviously
12 in different divisions in different cities.

13 Somebody contacted you and told you that a foreign
14 agent from some other government had informed them that on
15 May 25th of 2019 a computer identified by an IP address
16 eventually traced to Mr. Dugan's residence had accessed a
17 certain website?

18 MS. WHITE: Objection, Your Honor.

19 THE COURT: Overruled.

20 **A.** There was a lot more to it than that, but, yes, our
21 office in Boston, Massachusetts, forwarded me a package of
22 information that came both from DOJ's Child Exploitation and
23 Obscenities Section, as well as information from the foreign
24 law enforcement office, summarizing the ongoing
25 investigation and then providing me with the pertinent

Special Agent Michael Fleener - Cross (Schles)

1 information of what might have taken place in West Virginia.

2 BY MR. SCHLES:

3 Q. Did you ever speak directly to this foreign agent who
4 was conducting this investigation?

5 A. No, sir, I did not.

6 Q. Do you even know who this foreign agent is, a name?

7 A. A name? No, I do not.

8 Q. So you just know that some foreign agent contacted your
9 agency's office in Boston?

10 A. I know who the foreign agency is, what law enforcement
11 agency. I do not know the lead investigator for that
12 agency.

13 Q. So you can't vouch for that person's credibility,
14 ability, virtue, honesty or anything, can you?

15 MS. WHITE: Your Honor, I'm going to object.

16 THE COURT: I'll allow that question. We don't
17 need to get into the identity.

18 MR. SCHLES: I understand, Your Honor.

19 A. I can vouch that he is from a country with a rule of
20 law and he is from a very well known law enforcement agency
21 that has been worked with multiple times both by HSI, the
22 FBI, the Royal Canadian Mounted Police.

23 BY MR. SCHLES:

24 Q. Would you consider the United States a country with a
25 rule of law?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** Yes, sir.

2 **Q.** Would you then state that everything -- every law
3 enforcement agency in the United States is therefore
4 credible?

5 MS. WHITE: Objection, Your Honor --

6 THE COURT: Sustained.

7 MS. WHITE: -- we are far afield.

8 THE COURT: Sustained, sustained, sustained.

9 BY MR. SCHLES:

10 **Q.** So after you received a tip from somebody in your
11 agency in Boston, who's essentially just forwarding a tip
12 from someone you couldn't identify under any circumstances,
13 you then, using that information and some administrative
14 subpoenas, learned that the account -- the internet ISP --
15 internet service provider was Suddenlink and it was an
16 account at Mr. Dugan's residence, correct?

17 **A.** Yes, sir.

18 **Q.** And that essentially is the information that you used
19 to get permission to search, correct?

20 **A.** That information was provided in a written affidavit to
21 a U.S. magistrate judge and sworn to by myself and found to
22 be -- contained probable cause for a search warrant, yes.

23 **Q.** And you're saying that you -- you did not conduct any
24 examination of the hard drive on which the government is
25 alleging these images were found?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** I just read the report and looked at the evidence
2 collected by Trooper Boggs.

3 **Q.** So you could not tell me or the jury that any specific
4 image was created on that hard drive on a certain date?

5 **A.** No, sir. Trooper Boggs would have to do that.

6 **Q.** And so you can't say also when the Tor browser was
7 installed on that date?

8 **A.** Not by date, no, sir.

9 **Q.** You can't state when it was used, can you?

10 **A.** I can give a date range when it was used, but not a
11 date specific.

12 **Q.** Date range.

13 Your search warrant application specifically referenced
14 May 25th of 2019; is that correct?

15 **A.** That's correct, sir.

16 **Q.** Do you know what the Shimcashe is?

17 **A.** The what, sir?

18 **Q.** Shimcashe, S-h-i-m, cashe.

19 **A.** The Shimcashe?

20 **Q.** Uh-huh.

21 **A.** I am familiar with it, but not in terms of
22 technologically advanced enough to explain. I know what the
23 cache is, but the Shimcashe --

24 **Q.** Well, what is your understanding of what information is
25 stored on a Shimcashe on a computer?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** A cache is typically where a computer stores various
2 types of information whether it's biodata, data, website
3 data, temporary data.

4 **Q.** Would it store when a software program is executed on
5 the computer on a certain date?

6 Would there be evidence in the Shimcashe that a certain
7 software program was used on a certain date?

8 **A.** Possibly, but I think a forensic analyst such as Boggs
9 would be more qualified to answer that.

10 **Q.** Would it surprise you to learn that the forensic report
11 prepared in this case does not show the Tor browser being
12 executed on May 25th, 2019?

13 **A.** I wouldn't say it surprises me. I mean, no.

14 **Q.** Wasn't it your belief that the Tor browser was used to
15 access this target website on May 25th, 2019?

16 **A.** Yes, sir.

17 **Q.** But it doesn't surprise you that there's no record of
18 the Tor browser being used on that date?

19 **A.** I'm not sure what you're referring to because I haven't
20 looked at the file tree that specifically that Robert Boggs
21 printed out or that he conducted.

22 **Q.** So you -- having gotten the search warrant, essentially
23 your job at the scene on June 11th of 2020 was to supervise
24 the collection of evidence and you also conducted the
25 interview with Mr. Dugan, correct?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** Partially correct. My -- I was the lead agent on the
2 case. My job during that search warrant process essentially
3 was to interview him. Another agent by the name of Patrick
4 Kelly was assisting in the evidence collection, along with
5 four or five other agents.

6 **Q.** But you -- you were supervising?

7 **A.** I was interviewing him at the time. Ultimately it was
8 my choice of what got taken and what didn't.

9 After everything was brought to me and said this is
10 what we have. What would you like to take?

11 I would say take this, this, this, this, this, but --

12 **Q.** But you --

13 **A.** So ultimately that was my decision.

14 **Q.** You were the agent in charge during the execution of
15 the search warrant, correct?

16 **A.** Correct.

17 **Q.** And you also interviewed Mr. Dugan, correct?

18 **A.** That is correct.

19 **Q.** We can agree on that?

20 **A.** Yes, sir.

21 **Q.** It's not particularly controversial.

22 Did you interview the other two people in the house?

23 **A.** I did. Well, Ms. Dugan I did not interview at that
24 time. I believe a very brief interview was done by a female
25 state trooper. I did interview Tyler Dugan.

Special Agent Michael Fleener - Cross (Schles)

1 **Q.** And after the evidence was collected, you and your
2 coworkers, colleagues, left the residence with certain of
3 these items in your possession?

4 **A.** That is correct, sir.

5 **Q.** And you just, I assume, prepared a case submission
6 report for the state police forensic laboratory?

7 **A.** Yes, sir, and turned over all the items.

8 **Q.** And did you -- in doing so, did you -- and I'm going to
9 say parse the evidence that you had collected at the scene
10 and only ask for certain of it to be examined or was all of
11 it examined?

12 **A.** All of it was examined or attempted to be examined.
13 From what I understand, there were a couple of things that
14 either crashed or were broken to where it couldn't get into
15 by Robert Boggs. He couldn't access it.

16 **Q.** Some of the older drives were no longer operable?

17 **A.** Something like that, yes, sir.

18 **Q.** And this target website, were you familiar with the
19 target website before you got the tip from this foreign
20 agent?

21 **A.** No, sir, I was not.

22 **Q.** Were you aware of what the home page of that target
23 website looked like?

24 **A.** Not before the investigation, no, I was not.

25 **Q.** At what point did you become aware of what the home

Special Agent Michael Fleener - Cross (Schles)

1 page of the target website looked like?

2 **A.** During the course of the investigation, well into the
3 investigation, I requested copies of what the main page of
4 the websites looked like that were accessed by various
5 people, Mr. Dugan particularly in this case.

6 **Q.** There are no images of child pornography on the home
7 page of that website, is there?

8 **A.** No, sir, there's not.

9 **Q.** And you do not have any evidence beyond that the
10 computer that I'm -- I'm going to call it the Acer laptop
11 just to be easy. It's hard to say all those serial numbers
12 and stuff -- that any access beyond the home page of that
13 website occurred on May 25th, 2019, correct?

14 **A.** My understanding from the case and the relevant
15 information that was passed on to download any images from
16 that website you had to get past the main page by logging in
17 and creating a user name and password.

18 **Q.** That may be, but what I'm asking is whether you have
19 any evidence that this specific computer on May 25th, 2019,
20 did anything other than access the home page, which
21 contained no child pornography?

22 **A.** I agree to that. I have no exact proof that that
23 particular website was accessed beyond the main page.

24 **Q.** And that's true for May 25th, 2019, and it's true for
25 any other date as well, isn't it?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** I'm only familiar with that home page of that website,
2 but I'll say yes.

3 **Q.** So all you have and all you had is that -- that
4 computer, the Acer laptop, was used one time to access the
5 home page on one occasion, correct?

6 **A.** The initial lead provided information as such, correct.

7 **Q.** Do you claim to have other information that shows that
8 that computer was used to access beyond the home page of
9 that target website?

10 **A.** Other than all the images found.

11 **Q.** Well, images were found, but do you have any evidence
12 whatsoever that a single one of those images came from that
13 website at any time?

14 **A.** No.

15 **Q.** That was what -- and you knew that all along?

16 **A.** That's not what you asked.

17 **Q.** And you didn't want to provide that answer, did you?

18 MS. WHITE: Objection, Your Honor.

19 THE COURT: Sustained.

20 MR. SCHLES: I have no further questions, Your
21 Honor.

22 THE COURT: Redirect.

23 MS. WHITE: Thank you, Your Honor.

24

25

Special Agent Michael Fleener - Redirect (White)

REDIRECT EXAMINATION

BY MS. WHITE:

Q. Agent Fleener, you mentioned that you got a search warrant to execute on the Dugan's home; is that correct?

A. Yes, ma'am, it is.

Q. What's the process for getting a search warrant? What do you do?

A. The investigative technique into that is quite extensive.

Q. Well, let me see if I can narrow it down.

So there comes a point in your investigation when you feel as if you have information to go search someone's residence; is that right?

A. That is correct.

Q. What do you do in order to get permission to execute the search?

A. You put that --

MR. SCHLES: I'm going to object, Your Honor. This is irrelevant. It doesn't tend to make any issue -- any matter at issue more or less likely.

MS. WHITE: Well, it certainly does, Your Honor, if I may.

Defense counsel has asked extensive questions about the search warrant. I think it's relevant for the jury to understand --

Special Agent Michael Fleener - Redirect (White)

1 THE COURT: What questions are you thinking of
2 about the search warrant?

3 MS. WHITE: I'd like to establish that he wrote an
4 affidavit. It was presented to the magistrate judge.

5 MR. SCHLES: She's testifying now.

6 MS. WHITE: I'm trying to answer the Court's
7 question respectfully.

8 THE COURT: Finish your --

9 MS. WHITE: And I'd like to establish that that
10 search warrant probable cause is found by a magistrate judge
11 giving Mr. -- Agent Fleener lawful authority to enter the
12 Dugan home.

13 MR. SCHLES: Your Honor, I --

14 MS. WHITE: Mr. Schles has called into question
15 the agent's credibility with his question, simply
16 establishing that he was lawfully there.

17 MR. SCHLES: Your Honor, I did not even imply that
18 they were not lawfully there. That didn't come up in any
19 way.

20 THE COURT: I didn't get that either, but what's
21 your question for this witness?

22 BY MS. WHITE:

23 **Q.** Did you submit an affidavit to the magistrate judge
24 here in federal court to search --

25 **A.** Yes.

Special Agent Michael Fleener - Redirect (White)

1 Q. -- Mr. Dugan's home?

2 A. Yes, ma'am, I did.

3 Q. That was an extensive affidavit, correct?

4 A. Yes, ma'am, it was.

5 Q. Did the court find probable cause?

6 MR. SCHLES: Objection, Your Honor. Again,
7 irrelevant.

8 THE COURT: I believe it's beyond the scope of the
9 cross-examination and I'll sustain the objection.

10 MS. WHITE: Thank you, Your Honor.

11 BY MS. WHITE:

12 Q. Mr. Schles asked you a series of questions about items
13 recovered from the home.

14 Do you recall that?

15 A. Yes, ma'am, I do.

16 Q. And the PNY hard drive that was recovered, could you
17 tell me again where that was found?

18 A. It was in Mr. Dugan's home computer on his desk inside
19 of his work office -- a laptop computer.

20 Q. The computer was on his desk, you said?

21 A. I believe so, yes, ma'am.

22 Q. And what, if anything, of value did you find on that
23 hard drive?

24 A. Specifically that I can recall that the Tor -- Tor
25 URLs, which is basically a word for website, there was over

Special Agent Michael Fleener - Recross (Schles)

1 1,500 Tor URLs listed and captured and over 1,200 images of
2 child pornography.

3 MS. WHITE: Thank you, Your Honor.

4 Nothing further.

5 **RECROSS-EXAMINATION**

6 BY MR. SCHLES:

7 **Q.** The laptop was found in the home office. I think I had
8 asked you that on direct as well, correct?

9 **A.** Yes, sir.

10 **Q.** But also one, two, three, four, five, six, seven,
11 eight, nine, ten, eleven, twelve items were also found in
12 that home office and none of those other twelve contained
13 child pornography, correct?

14 **A.** That's correct, sir.

15 MR. SCHLES: No further questions.

16 THE COURT: All right. May the witness be
17 excused?

18 MS. WHITE: Yes, Your Honor. Thank you.

19 THE COURT: Any objection?

20 MR. SCHLES: No, Your Honor.

21 THE COURT: You're excused from the trial.

22 Thank you very much.

23 THE WITNESS: Thank you.

24 THE COURT: Call your next witness.

25 MR. HEINRICH: Your Honor, the United States calls

Corporal Robert Boggs - Direct (Heinrich)

1 Corporal Robert Boggs to the stand.

2 **CORPORAL ROBERT BOGGS, GOVERNMENT WITNESS, SWORN**

3 **DIRECT EXAMINATION**

4 BY MR. HEINRICH:

5 **Q.** Good afternoon, sir. I'm glad we finally tracked you
6 down.

7 Do you mind just telling everybody your first name and
8 your last name and then spell your last name for the record?

9 **A.** Yes. My name's Robert Boggs. Last name's B-o-g-g-s.

10 **Q.** All right. Thank you, sir.

11 And in case your uniform doesn't give it away, where do
12 you currently work?

13 **A.** With the West Virginia State Police.

14 **Q.** And what is your current rank?

15 **A.** Current rank is Corporal.

16 **Q.** And, Corporal, how long have you been a member of the
17 West Virginia State Police?

18 **A.** It will be 24 years this November, so 23 years.

19 **Q.** And what are some of the various roles you've had in
20 your almost 24 years with the West Virginia State Police?

21 **A.** The first seven years I was a field trooper stationed
22 in Randolph County just doing normal trooper duties: taking
23 calls, investigations, road patrol, things of that nature.

24 In --

25 THE COURT: Would you pull the microphone a little

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1 closer, please.

2 THE WITNESS: I'm sorry?

3 THE COURT: Would you pull that microphone a
4 little closer.

5 THE WITNESS: Yes, sir.

6 THE COURT: Thank you.

7 **A.** In 2005 I was taking classes for digital crime and
8 computer forensics and was offered to develop a digital
9 forensics lab located at Marshall University's Forensic
10 Science Center and transferred down there and developed that
11 lab.

12 BY MR. HEINRICH:

13 **Q.** Okay. And tell us a little bit more about what the
14 West Virginia State Police Digital Forensic Lab is.

15 **A.** Basically we are a forensic lab that we accept digital
16 evidence, anything that holds a binary code, ones and zeros.
17 We will try to take a look at it and pull out information if
18 needed for the investigation in a forensically sound manner.

19 **Q.** And how many of these labs does the West Virginia State
20 Police have?

21 **A.** We have two.

22 **Q.** So you mentioned I think the one at Marshall.

23 Where is the other one?

24 **A.** The other one is located at WVU.

25 **Q.** And when did the Marshall location officially open?

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1 **A.** Officially about 2005. They were -- had already had
2 the room built and they were waiting on me to be transferred
3 down there; however, I had to spend some time at WVU. So
4 we've been fully functional certainly since 2006.

5 **Q.** And how long have you been in charge of the laboratory?

6 **A.** The entire time.

7 **Q.** And what are your duties at the lab specifically?

8 **A.** Right now I have three civilian analysts that work with
9 me and do case work. Primarily assist them and also go out
10 on search warrants assisting other agencies with device --
11 digital device previews and triage.

12 **Q.** What does triage mean in your world?

13 **A.** Triage basically is -- the contemporary home -- the
14 modern home now has so many digital devices. You have
15 multiple cell phones, multiple computers, tablets, you name
16 it. Everything's digital now and all of it can be
17 manipulated in one way or another, so we try to locate and
18 preview -- forensically preview these devices to try to
19 determine which device is the most likely one to have been
20 potentially used in a crime.

21 **Q.** And you mentioned a little bit about analyzing
22 electronic devices.

23 This forensic analysis, does that include looking at
24 portions of an electronic device that normally can't be
25 seen?

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1 **A.** Yes.

2 **Q.** Are there hidden portions of some devices that are not
3 easily accessible by an average user?

4 **A.** Yes.

5 **Q.** And can you summarize for the jury some of the training
6 you've received regarding the examination of digital
7 evidence?

8 **A.** Yes. Starting in about 2005 I started taking classes
9 at National White Collar Crime Center in Fairmont and I
10 exhausted the vast majority of those classes; at the Federal
11 Law Enhancement Training Center, FLETC, in Glynco, Virginia;
12 the National Computer Forensics Institute sponsored by the
13 Secret Service in Hoover, Alabama; also many vendor specific
14 such as Axiom, which is the forensic program to sweep that
15 use -- that I used in this particular exam. I've taken
16 certifications from them and many, many others. I mean,
17 it --

18 **Q.** Okay. I think that's sufficient so we can make it home
19 tonight.

20 Do you instruct other people other people as well?

21 **A.** Yes. All basic and cadet officers who are in the
22 academy -- every police officer that is in West Virginia
23 that goes through the academy does get a class.

24 I developed a basic electronic evidence identification
25 search and seizure class, mobile phones -- mobile phone

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1 investigations. And we consult with any investigator that
2 needs technical help.

3 **Q.** So for the past ten to fifteen years, any trooper that
4 graduates the academy you've taught a class to?

5 **A.** Yes, plus in-service occasional -- occasionally.

6 **Q.** And, Corporal, what type of devices do you most
7 commonly examine?

8 **A.** Well, right now in the last many -- quite a few years
9 it's all mobile devices now. Cell phones seem to be the big
10 thing.

11 When I first started years ago, you would get maybe ten
12 hard drives submitted for every one cell phone. Now it's
13 the other way around. Cell phones seem to be the modern
14 method for people accessing the web, computer -- computer
15 work and whatnot so --

16 **Q.** And over the years how many times do you think you've
17 analyzed a hard drive from a computer?

18 **A.** How many hard drives?

19 **Q.** Hard drives to the best of your estimate.

20 **A.** At least 500. Easily 500. That's very conservative.

21 **Q.** And in addition to cellular phones, is this something
22 you routinely do as well?

23 **A.** Yes.

24 **Q.** Have you ever previously been qualified as an expert in
25 a court of law regarding the forensic analysis of electronic

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1 devices?

2 **A.** I have.

3 **Q.** What courts?

4 **A.** Federal court, Judge Johnston. It was down in Beckley.
5 And I think Judge Chambers in Huntington. All over the
6 state, multiple counties.

7 MR. HEINRICH: Your Honor, at this time I would
8 ask that Corporal Boggs be qualified as an expert in the
9 area of forensic analysis of electronic devices.

10 THE COURT: Any voir dire?

11 MR. SCHLES: No objection, Your Honor.

12 THE COURT: All right. This witness may offer
13 opinion testimony in the area of forensic examination of
14 digital devices.

15 Generally lay people aren't allowed to give opinions,
16 but somebody with special training or experience may give
17 appropriate opinions.

18 You may inquire.

19 MR. HEINRICH: Thank you, Your Honor.

20 BY MR. HEINRICH:

21 **Q.** Corporal, when you're conducting a forensic analysis of
22 a phone or a computer, do you just flip through the phone or
23 scroll through the computer like one of us would do?

24 **A.** No, sir, that would -- that's the ultimate sin in this
25 discipline I guess you could say.

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1 **Q.** So what is the right way you do it in your field of
2 forensic analysis?

3 **A.** Well, in terms of a computer, when we're triaging, we
4 put the hard drive -- we will remove the hard drive from the
5 computer or laptop, whatever it is, and put it on a hardware
6 write blocker, which is just a bridge. You just plug the
7 hard drive in. It goes in the USB port. And what it does
8 is it allows you read-only access. So you can read the
9 data, but you cannot write anything to that hard drive. The
10 whole idea is to keep that hard drive as pristine and
11 untouched as possible.

12 What we do, once we preview it, determine that it might
13 be relevant, it's secured, taken back to the lab and
14 forensically imaged. And we work off that image. We put
15 the original back in the lockers so we don't -- we try to
16 handle it as least as possible.

17 **Q.** And do you ever forensically analyze a device if you
18 have not been granted lawful authority?

19 **A.** No.

20 **Q.** So what's the most common way that you would get lawful
21 authority?

22 **A.** Search warrant or consent.

23 **Q.** Corporal, have you ever heard of the term carved space?

24 **A.** Carved and allocated. There's several terms. We
25 prefer to use unallocated.

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1 **Q.** Okay. So do you mind telling the jury what unallocated
2 space is in the context of forensic analysis?

3 **A.** Sure, it's based on the hard drive. Whenever you
4 install the operating system or if it's preinstalled, you
5 take pictures and put on your hard drive, those are active
6 files. Any file that is on a computer that is not deleted
7 is considered an active file.

8 Now, there's a portion for the hard drive that's for
9 active files and any of the space that's not being used,
10 even if it was once used, is called unallocated. It's not
11 being currently allocated by the operating system for use
12 either by the user or by the system. So the unallocated
13 space is where your deleted files would reside.

14 **Q.** So even if an item has been deleted by the user, where
15 would you still find it possibly?

16 **A.** Can you repeat? I'm sorry.

17 **Q.** Of course. If an item has been deleted by the user,
18 could you still find it in unallocated space?

19 **A.** In the vast majority of cases. The only case that
20 makes it pretty much impossible is if -- if that space has
21 been written over. If that space has been reused by the
22 operating system or the user.

23 **Q.** And, Corporal, what is the Tor browser?

24 **A.** The Tor is -- The Onion Router is what it stands for.
25 Essentially it's a -- it's a modified version of the popular

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1 Firefox browser. And this is -- it was developed many,
2 many, many years ago by DARPA and became an open source
3 project, which basically means the code was open. Anybody
4 could, you know, ensure or modify that code.

5 However, the Tor browser sets on top of -- or sets at
6 the bottom of Firefox. And all the Tor does, it routes the
7 traffic to multiple IP addresses throughout the world.

8 So -- now, it's slower than the regular internet
9 because it has to make so many hops. So when you do a
10 search or a query on -- using Tor, it may hop -- it will go
11 maybe to one server in Vietnam, one in Russia, one in China,
12 one in the U.S., and essentially what it does it makes it
13 almost impossible to track because so many of these
14 jurisdictions, if you send them a subpoena or a court order,
15 they don't care. They're not going to honor it.

16 So -- and each of the connections and each of the hops
17 are encrypted, so there is a huge level of anonymity to
18 using that browser.

19 It's popular among, you know, political activists,
20 especially in other countries, things of that nature, but
21 it's certainly popular for many other illegal activities.

22 **Q.** And I'd like to direct your attention now to June 11th
23 of 2020.

24 Were you working with Special Agent Fleener of HSI
25 regarding the execution of a search warrant down at a house

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1 in Logan?

2 **A.** Yes.

3 **Q.** And whose house was that?

4 **A.** It was the Dugan residence. I don't remember the
5 family's names individually. It was the Dugan's residence.
6 I remember it quite well.

7 **Q.** Do you remember encountering a gentleman named Raymond
8 Dugan?

9 **A.** Yes.

10 **Q.** And do you mind looking around the courtroom today and
11 telling us if you see Mr. Raymond Dugan anywhere in the
12 courtroom?

13 **A.** Yeah, Mr. Dugan is the gentleman in the gray suit.

14 **Q.** And do you mind just describing a little more what
15 color shirt or tie he's wearing?

16 **A.** Yellow tie, blue shirt, gray -- yellow mask.

17 MR. HEINRICH: Your Honor, if the record would
18 reflect the witness has pointed out the defendant and
19 described the clothing he's wearing?

20 THE COURT: Yes.

21 MS. WHITE: Thank you.

22 BY MR. HEINRICH:

23 **Q.** Corporal, were any devices seized from the Dugan
24 residence on June 11th of 2020?

25 **A.** Yes.

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1 **Q.** And you mentioned the triage method before. Was the
2 triage method used on that date to limit how many items were
3 seized?

4 **A.** Yes, there was many, many digital items, thumb drives,
5 computers, phones, things of that nature within that
6 residence that we had to look at.

7 **Q.** And was one of the devices that was seized a laptop
8 that included a PNY hard drive?

9 **A.** Yes.

10 **Q.** And do you remember from which -- from where the --
11 from where the computer that contained that hard drive came
12 from?

13 **A.** Yes, in the -- the gentleman's home office room there
14 was a bookshelf as if you were sitting at the desk, the
15 bookshelf was to the right, and it was located in the bottom
16 area of that bookshelf.

17 **Q.** And what type of room was that from what you could
18 tell?

19 **A.** It appeared to be Mr. Dugan's office.

20 **Q.** What made you say that?

21 **A.** Everything on the desk was like addressed to him and
22 bills and work material. You know, it didn't appear to be
23 like a kid's gaming area or anything. Just everything
24 suggested that it was Mr. Dugan's office.

25 **Q.** And right now I'm going to play you a very brief

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1 portion of what's already been introduced as Government's
2 Exhibit No. 1. It's the video from June 11th.

3 MR. HEINRICH: And if we could start playing that
4 exhibit starting at 3:19 into the video, please.

5 (Video played.)

6 MR. HEINRICH: Play it one more time starting at
7 3:15.

8 (Video played.)

9 MR. HEINRICH: Stop there, please.

10 BY MR. HEINRICH:

11 **Q.** So that portion from 3:14 to 3:21, is that the
12 defendant in that video there?

13 **A.** Yes, sir.

14 **Q.** And do you see where he points in the video?

15 **A.** Yes, sir.

16 **Q.** What room was that where he points at in this video?

17 **A.** That was the office that we're speaking of.

18 MR. HEINRICH: We can take that down if you don't
19 mind.

20 BY MR. HEINRICH:

21 **Q.** And now I'd like to move on to June 24th of 2020. Is
22 that when you conducted a forensic download of the PNY hard
23 drive that was found in the defendant's office?

24 **A.** That was the date I believe I started the examination
25 of that drive, yes.

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1 **Q.** Okay. And when you conducted that forensic analysis of
2 the PNY hard drive, did you find any material relevant to
3 this case on that computer?

4 **A.** I did find many files and artifacts that appeared
5 relevant, yes.

6 **Q.** And specifically any evidence of child pornography?

7 **A.** Yes.

8 **Q.** Approximately how much?

9 **A.** How much artifacts?

10 **Q.** How many images, if any.

11 **A.** 1,200, 1,300. I'm guessing. There was a lot.

12 **Q.** And what happens when you see -- in a case like this
13 where you're working with HSI, when you find an image that
14 could be child pornography, what happens in the process?

15 **A.** Well, I personally don't sit there and determine for
16 sure whether it's child pornography or not. That's not my
17 job. What I do is any picture that looks suspicious, if it
18 looks edgy, I guess you could say, looks inappropriate, I
19 bookmark it within the forensic software and place that in
20 the digital report for the investigator to review and to
21 determine relevance.

22 **Q.** So the approximately 1,200 number you mentioned, that's
23 something you flagged for Special Agent Fleener to make the
24 ultimate determination?

25 **A.** Yes.

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1 **Q.** And I'd like to ask you a few more general questions
2 about searching the internet versus searching on the Tor
3 browser.

4 When you're using a normal internet browser like Google
5 Chrome or Internet Explorer, can you find child porn just by
6 searching child porn into the search engine?

7 **A.** Very doubtful. Usually if you make a search like that
8 it's going to be -- immediately be flagged by the provider,
9 the search engine, and you're going to get some -- a lot of
10 times you'll get hits like for counseling and things of that
11 nature, but, no, just a simple Google search on the clear
12 net, which is what you're -- which is what you're referring
13 to, the open internet, no. You really have to look for it
14 to find it.

15 **Q.** And does a browser like Internet Explorer, Google
16 Chrome, does that work on the dark web?

17 **A.** No.

18 **Q.** Conversely, how quickly can a person find child
19 pornography when they're on the dark web using the Tor
20 browser?

21 **A.** Within three clicks, four clicks, a couple of searches.
22 It's -- the dark net is inundated with child sexual
23 exploitation sexual material and illegal marketplaces for
24 drugs, guns. You name it; you can find it on there.

25 MR. HEINRICH: Your Honor, may I approach the

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1 witness?

2 THE COURT: You may.

3 MR. HEINRICH: After showing to defense counsel.

4 Thank you, sir.

5 BY MR. HEINRICH:

6 Q. Corporal, if you don't mind looking at what has been
7 marked for identification purposes only as Government's
8 Exhibit No. 7.

9 Do you recognize that document?

10 A. Yes. Yeah, this is the printout of the Shimcashe.

11 Q. And that's Shim, S-h-i-m?

12 A. Yes, sir.

13 Q. What is a Shimcashe?

14 A. Well, since about -- it started about -- in the XP --
15 when XP come out. Essentially what that is it's a program
16 capability test that the operating system does. Any time
17 you install a program, the operating system will determine
18 whether that program is compatible with that particular
19 version of Windows and it logs that program that you're
20 installing into the Shimcashe. And that's what we're
21 looking at here. Those programs that were executed --
22 downloaded and/or executed.

23 Q. So it's a way of telling when programs may have been
24 downloaded and installed onto a computer?

25 A. Yes.

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1 THE COURT: You said downloaded or executed. Is
2 there a difference?

3 THE WITNESS: Yes, sir. You can download a
4 program, but not execute it, not start the installation
5 process. You can do that.

6 THE COURT: Explain that further, could you?

7 If -- let's say could I download a picture, but not
8 look at it?

9 THE WITNESS: No, sir. A picture would not be an
10 executable file. You know, like an .exe file that contains
11 code for the operating system to do multiple processes,
12 whereas a picture would not be. A picture would simply come
13 up in a program. It's not doing anything. It's just simply
14 displaying the data contained therein.

15 THE COURT: One more question.

16 Would you have to do something in particular to
17 download a photograph or a picture?

18 THE WITNESS: You can, for example, right click,
19 save picture as, and save it to your hard drive, yes, you
20 can. But also, if you're surfing the internet, any page
21 that would come up, there's something called temporary
22 internet files, your internet cache. All the files in
23 applets that are within that web page that you're viewing is
24 going to a temporary folder. So should you ever -- the
25 whole purpose of --

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1 MR. SCHLES: Your Honor, I hate to interrupt, but
2 when he turns his back away from the microphone, I have
3 trouble hearing him.

4 THE COURT: I understand.

5 Could you speak into the microphone? You were talking
6 to me.

7 THE WITNESS: Yes, sir. Okay. We was talking
8 about temporary internet files.

9 THE COURT: Talk to the jury and I'll hear you.

10 THE WITNESS: Temporary internet files.

11 The whole idea and the creation of the temporary
12 internet files was really a result of dial-up days. And the
13 computer will cache these files so should you ever return to
14 that website it don't have to download it. You know, in the
15 old days it took forever. Now it don't. It serves less of
16 a purpose, but it is still within the operating systems.

17 BY MR. HEINRICH:

18 Q. So the Shimcashe report, though, that deals with files
19 like exe files?

20 A. Any executable file, yeah.

21 Q. What's an executable file?

22 A. It's a dataset. It's a file with data that tells the
23 computer and operating system to run certain processes. And
24 in doing so those processes will show you the program that
25 you're installing.

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1 Q. And so that includes a process of installing a program?

2 A. Yes.

3 Q. And what's been marked for ID purposes at Government 7,
4 is that a fair and accurate copy of a Shimcashe report that
5 you produced as part of your analysis of the PNY hard drive
6 recovered on June 11th?

7 A. It is.

8 Q. Is that based on data from the hard drive itself?

9 A. Yes.

10 MR. HEINRICH: Your Honor, at this point I would
11 ask that Government's Exhibit Number 7 be introduced into
12 evidence.

13 THE COURT: Is there objection?

14 MR. SCHLES: No objection, Your Honor.

15 THE COURT: I'm sorry?

16 MR. SCHLES: No objection, Your Honor.

17 THE COURT: It may be admitted.

18 **GOVERNMENT EXHIBIT NUMBER 7 ADMITTED**

19 MR. HEINRICH: Thank you, Your Honor.

20 If I could ask if we could publish Exhibit Number 7,
21 the Shimcashe reports.

22 THE COURT: Exhibit 7 may be published.

23 BY MR. HEINRICH:

24 Q. We see a one-page spreadsheet of sorts here. If we
25 could zoom in on the middle column called key list -- excuse

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1 me -- key last updated.

2 **A.** Uh-huh.

3 **Q.** That entire column or that top row of that column
4 first, the title.

5 And, Corporal, do you mind just explaining to the jury
6 what this column -- this key last updated column is?

7 **A.** Yes. The Shimcashe is located in the Windows registry.
8 Windows registry consists of segments we call hives. In
9 this particular hive is -- these hives are the -- there's
10 keys in these hives that are updated periodically.

11 Now, it's important to note that this date and time
12 that's displayed right here does not mean that that's the
13 exact time that that file was downloaded and/or executed.
14 That's when the key was updated -- the registry key.

15 Now, the registry does update fairly frequently, but
16 that would not be the exact date and time.

17 **Q.** But a close approximation?

18 **A.** Yeah, I mean, it updates fairly frequently. There's
19 really no set time. That's based on the operating system's
20 algorithms for efficiency and speed and things of that.

21 **Q.** So this column would say when a program's registry was
22 updated?

23 **A.** That's when that registry key would have been updated
24 that contains that data, yes.

25 **Q.** And this Shimcashe report that's Government 7, is that

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1 a specific file program that it relates to?

2 **A.** Yeah, these are all referenced to the Tor browser. It
3 shows roughly the dates and times -- at least when the keys
4 were updated -- that it was, in fact, downloaded on -- it
5 looks like at least twice and it had been run the remaining
6 12 times, 11 times. So it had been run and executed
7 multiple times.

8 **Q.** And does this necessarily show every single time that
9 the Tor browser was used?

10 **A.** No, no, these keys typically, if I remember correctly,
11 will hold like the last 25. Some are less, some are more.
12 So this is not representative of everything that's ever been
13 run. This is just some of the recent -- you know, recent
14 ones.

15 **Q.** And is it just one when the program is run or is it
16 when the program is reinstalled?

17 **A.** Ran. That was when the program was ran and -- now, if
18 you notice there's two of them on here that you can see. It
19 says browser, Tor download exe. It's a little bit longer
20 name. Those appear to possibly be the downloads of that
21 executable file.

22 **Q.** Okay.

23 **A.** But that is definitely when that file was executed.

24 **Q.** Okay. So if we could now -- first, I guess, just to
25 clear something up, there is a box right below that. So I

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1 see it says 1/1/2000, 12:00 a.m.

2 Is that, based on your experience, an accurate date?

3 **A.** No, no.

4 **Q.** Why would a date like this be in the spreadsheet?

5 **A.** It could be corrupt data, something that was being
6 prepared to be purged possibly. Sometimes you do get
7 inaccurate date and timestamps. You cannot rely on date and
8 timestamps just totally in and of themselves.

9 **Q.** Go to the box right below this, please.

10 So what does this date represent?

11 **A.** That -- January 30th, 2019, at that time, and that
12 would be -- let's see if has a time. It should be UTC plus
13 or minus zero, yes.

14 THE COURT: You need -- I'm sorry. Speak clearly.

15 **A.** Okay. The time represents UTC, which is what the
16 Windows registry actually keeps time with.

17 BY MR. HEINRICH:

18 **Q.** And based on your -- the spreadsheet that you have in
19 front of you, Government 7, does that appear to be the first
20 time that the Shimcashe report indicates the Tor browser was
21 executed?

22 **A.** Yes, at least the first time that it was recorded that
23 we have a record of. Now, it could have happened before.
24 We can't tell, but I can just tell -- I can tell you based
25 on this record, yes.

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1 **Q.** But you know at least as of January 30th, 2019, it had
2 been installed or executed?

3 **A.** Yes.

4 **Q.** If we could go to box one row below that, please.

5 And, Corporal, this date, November, 4, 2019, if you
6 don't mind just scanning this spreadsheet, is this the last
7 date that you see in the spreadsheet?

8 **A.** Yes.

9 **Q.** So this would represent the last known time based on
10 the Shim report that we know the Tor browser was executed?

11 **A.** Yes, that's what it indicates.

12 **Q.** You mentioned you could tell a little bit about the
13 file names.

14 Do any of these file names indicate that the event that
15 was recorded is a national installation of the Tor browser?

16 **A.** That's what this is.

17 **Q.** So these were all times it was installed?

18 **A.** These were all times it was executed.

19 **Q.** Okay. Does that mean --

20 **A.** That means once -- when you install it, it puts the
21 icon on your computer. When you double click it, that's an
22 execution. You're starting -- you're executing that
23 program.

24 **Q.** And these executions, are these new installations of
25 the Tor browser or simple use?

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1 **A.** Use.

2 **Q.** Are any of these related to installation?

3 **A.** I believe that number six and number two would be
4 installations.

5 **Q.** So at least a couple of times --

6 **A.** Because you see the word install? That's actually the
7 execution --

8 **Q.** If I could just time-out.

9 What row are you talking about?

10 **A.** Row two. If you look, you'll see it says install in --
11 in --

12 **Q.** Hang on one second, please.

13 **A.** Yeah.

14 **Q.** File paths there?

15 **A.** Yes. If you look in the file path, you will see --
16 also you'll see, in that file path, the folder downloads.

17 So the file would have been in the downloads folder.
18 That's where it's located. And the Tor browser install for
19 Windows 64 exe. That exe is the installation file that --
20 that puts that program on your computer. So that's where
21 that executable resided and when it was executed and that's
22 the installation.

23 **Q.** So based on this report we know that on or about
24 January 30th the Tor browser was installed?

25 **A.** Yes.

Corporal Robert Boggs - Direct (Heinrich)

1 **Q.** And if there's other dates where it appears it was
2 installed, would that indicate it must have been uninstalled
3 at some point?

4 **A.** Yes, and that's -- that's not unusual, yeah.

5 MR. SCHLES: Objection. He's speculating, Your
6 Honor.

7 THE COURT: Overruled.

8 BY MR. HEINRICH:

9 **Q.** And do you mind -- rather than go through each one
10 one-by-one, you mentioned that the first apparent date on
11 there is January 30th and the last one that popped up, I
12 believe, was November 4th of 2019.

13 The rest of the dates that you see below that, are they
14 all -- are they all in between those two dates?

15 **A.** Yes. It appears so, yes.

16 Let's see. Six, seven, eight, nine, ten -- ten, yes.

17 **Q.** Okay.

18 **A.** January to November, yeah.

19 **Q.** Thank you, sir. I think we can take down the
20 spreadsheet at this point.

21 Did you also, as part of your analysis, look at URLs?

22 **A.** Yes. The forensic software we use actually goes in and
23 carves and looks for active URLs, which is simply the
24 location -- logical location of a website address.

25 **Q.** And during your analysis were you able to determine if

Corporal Robert Boggs - Direct (Heinrich)

1 this PNY hard drive accessed any Tor website?

2 **A.** Yes, there are many, many Tor website URLs recovered.

3 **Q.** Do you recall the approximate number that it was at or
4 exceeded?

5 **A.** It was well over a thousand. I mean, I didn't go
6 through each and every single one of them, but there was a
7 lot.

8 **Q.** And based on your training and your experience as an
9 expert, does that mean at least over a thousand dark
10 websites were accessed using the Tor browser?

11 **A.** Many of the URLs were the same, so that would indicate
12 revisiting whatever website it is. And also there's some
13 suspect terms located within the URL that were, I think,
14 relevant to the case potentially.

15 **Q.** What are some of these terms based on your training and
16 experience that are suspect?

17 **A.** Well, some -- in the URLs some of the letters and words
18 that you see, they don't make any secret about what it is.
19 Like, I remember one was --

20 MR. SCHLES: Your Honor, I'm going to object just
21 as general conversation. If they have specific entries in
22 these logs, they can talk about that, but they're just
23 talking about things that they have not shown have any
24 foundation as related to this case.

25 THE COURT: All right. Let's go to specifics.

Corporal Robert Boggs - Direct (Heinrich)

1 BY MR. HEINRICH:

2 Q. As to this specific case, Corporal, what are some
3 specific terms you remember seeing in your analysis of the
4 PNY hard drive?

5 A. I distinctly remember one with the term boys pub in it.
6 And that is -- and -- and I've been on the dark web within
7 the lab and I know what this is. It's a child porn site
8 that caters to specifically young boys.

9 Q. And so you mentioned that even though there may be some
10 revisits, at least a thousand dark websites were visited by
11 this hard drive?

12 A. Yes.

13 Q. How long does it take to load a single URL?

14 A. Well, the Tor browser is a little slower and it will
15 depend on the amount of media that is contained on the front
16 page, if you will, but typically you could probably load a
17 page within a few seconds, five seconds, ten seconds easily.

18 The downloading, if you was to choose to download
19 videos, now that takes a little longer because the file size
20 is obviously much, much larger so --

21 Q. So you can't simultaneously download 1,000 URLs at
22 once? It's a process?

23 A. Yes.

24 Q. And you mentioned a little bit --

25 THE COURT: Let me interrupt for one second.

Corporal Robert Boggs - Direct (Heinrich)

1 Does it take a specific act by the operator of the
2 computer to download each URL?

3 THE WITNESS: There are search engines on the dark
4 web, much like the clear net, and you will do searches in
5 these engines. You know, for marketplace guns and you're
6 going to get inundated with a bunch of these different sites
7 and you'll click on one. And when you click on it, that URL
8 will be displayed in the address bar and you would go to
9 that website.

10 THE COURT: But in trying to understand that, are
11 you telling me the search engine would list some of these
12 URLs as it's searching?

13 THE WITNESS: Yes, sir.

14 THE COURT: Okay.

15 THE WITNESS: Yeah, this is not the same search
16 engines that you might find with Google and on the clear
17 net. These are hidden sites themselves.

18 THE COURT: So the URLs might themselves just be
19 the product of the search engine's operation?

20 THE WITNESS: No, no. You -- no, these are --
21 yes, these would have been displayed -- well, actually it --
22 some are displayed when you do -- when you do a search.
23 That's a possibility.

24 THE COURT: Sorry. Go ahead.

25 BY MR. HEINRICH:

Corporal Robert Boggs - Cross (Schles)

1 Q. And so that we're clear, it can be displayed when you
2 do a search, but you have to click on it for it to be saved
3 in the computer where you saw these?

4 A. For that website to be loaded and to access the content
5 of that site, yeah, yes. It's not just going to do the
6 search and then download everything from every website
7 that's seen. You have to actually click on the website
8 to --

9 Q. So there was --

10 A. -- to obtain the data.

11 Q. I apologize.

12 There was at least 1,000 times that a site was either
13 clicked on or manually entered?

14 A. Yes, that was displayed on the computer.

15 MR. HEINRICH: Thank you. Your Honor, I do not
16 believe I have any additional questions for Corporal Boggs.

17 Sir, I appreciate it.

18 Thank you.

19 THE WITNESS: Yes, sir.

20 THE COURT: Cross-examine.

21 MR. SCHLES: Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 BY MR. SCHLES:

24 Q. Corporal Boggs, is it your understanding that simply
25 installing the Tor browser does not mean that the Tor

Corporal Robert Boggs - Cross (Schles)

1 browser was used to access child pornography?

2 **A.** That's correct, sir.

3 **Q.** And executing the Tor browser does not mean it was used
4 on a date that it was executed to view child pornography,
5 correct?

6 **A.** That's correct.

7 **Q.** You can use the Tor browser for all sorts of things
8 legal and illegal, correct?

9 **A.** Yes, sir.

10 **Q.** And you can't tell from this report on these dates when
11 the browser was executed what was done, can you?

12 **A.** No, sir.

13 **Q.** And when you say that there were a thousand Tor URLs,
14 how come the report that was prepared only lists 100?

15 **A.** There should have been more. I know there was more
16 recovered.

17 **Q.** Well, are you familiar with the report there's actually
18 a tab for Tor URLs?

19 **A.** Yes, that's the Tor URLs in the tab of the report.
20 That should be the number.

21 **Q.** And they are numbered 1 through 100.
22 Would that not be accurate?

23 **A.** It should be accurate. It's possible that I misspoke,
24 but --

25 **Q.** So could you have misspoke and it was a hundred and not

Corporal Robert Boggs - Cross (Schles)

1 a thousand or how do you explain that?

2 **A.** No, I believe there was well over a thousand. I'm not
3 sure what report you're looking at.

4 **Q.** I am looking --

5 **A.** -- because --

6 **Q.** -- at the report that was --

7 THE COURT: Stop. Both of you stop interrupting
8 each other. Take a pause.

9 Go ahead, Mr. Schles.

10 BY MR. SCHLES:

11 **Q.** Corporal Boggs, you prepared a report for the U.S.
12 Attorney's Office, correct?

13 **A.** Yes, sir.

14 **Q.** And it was your forensic examination report of the PNY
15 240 gig hard drive, correct?

16 **A.** Yes.

17 **Q.** And it has multiple sections or tabs, whatever you want
18 to call it --

19 **A.** Yes.

20 **Q.** -- listed in a column on the left side, correct?

21 **A.** That's correct.

22 **Q.** And you click on those and it gives you the data that's
23 contained in each one of those. And there are many, many of
24 them: Google map queries, identifier social media URLs, Tor
25 URLs specifically. There's a specific tab for The Onion

Corporal Robert Boggs - Cross (Schles)

1 Router, Tor, URLs and that shows when the Tor browser was
2 used to visit the identified URLs, correct?

3 **A.** Yes.

4 **Q.** There's only 100 in your report, correct?

5 **A.** I have no idea. I thought there were many, many more.

6 **Q.** You haven't reviewed your report any time recently to
7 be able to explain this huge discrepancy?

8 **A.** No.

9 **Q.** Would it help you if I showed you?

10 THE COURT: Showed him what?

11 MR. SCHLES: I'm going to show him a printout from
12 the report and ask him if it refreshes his recollection,
13 Your Honor.

14 THE COURT: All right. Do you want to mark it?

15 MR. SCHLES: Yes. May I have it marked
16 Defendant's Exhibit Number 1 for identification?

17 THE COURT: Sure.

18 MR. SCHLES: May I approach, Your Honor?

19 THE COURT: You may.

20 MS. WHITE: Your Honor, may I take a quick peek at
21 that exhibit?

22 THE COURT: Certainly.

23 MR. SCHLES: Oh, I'm sorry.

24 MS. WHITE: That's all right. I understand.

25 Thank you, sir.

Corporal Robert Boggs - Cross (Schles)

1 THE WITNESS: This appears to be a list.

2 BY MR. SCHLES:

3 Q. Stop. Stop, please.

4 Let me first ask you, do you recognize that document
5 that's been marked as Defendant's Exhibit Number 1 for
6 identification?

7 A. It looks familiar, yes.

8 Q. Does it refresh your recollection as to how many Tor
9 URLs were identified on the PNY hard drive?

10 A. No.

11 Q. It does not?

12 A. It does not reflect -- I -- I believe it was much more
13 than 100. However, do you have the report?

14 Q. You believe it was more.

15 Can you explain why your belief differs so dramatically
16 from the report?

17 A. No. The only explanation I would have I know there
18 were several custom reports made. That was, I believe, one
19 of them when you and -- and the U.S. Attorney's Office came
20 to the lab and I created those custom reports. The only
21 explanation I would have is we exported maybe the first 100.
22 That's it. I don't know.

23 Q. So somewhere along the line a mistake was made?

24 A. Partial.

25 Q. And going back to the Shimcashe, which you discussed on

Corporal Robert Boggs - Cross (Schles)

1 direct examination, I think we both agree that the 1/1/2000
2 must be some kind of placeholder because none of this stuff
3 existed on January 1st, 2000; is that correct?

4 **A.** That's correct.

5 **Q.** On 1/30/2019 we have what is an install exe, correct?

6 **A.** Yes.

7 **Q.** It's number two in the Shimcashe --

8 **A.** Yes, sir.

9 **Q.** -- list?

10 **A.** Yes, sir.

11 **Q.** The ones following that are not installations. Those
12 are when the already installed software program was
13 executed, which is a fancy computer guy word for used,
14 correct?

15 **A.** Yes, sir, that's correct.

16 **Q.** Is it not correct that the Shimcashe does not show the
17 Tor browser being used on May 25th, 2019?

18 **A.** Yes, you're correct.

19 **Q.** But it shows it being used prior to May 25th, 2019?

20 **A.** Yes.

21 **Q.** And it shows it being used after May 25th, 2019,
22 correct?

23 **A.** Yes.

24 **Q.** So it's not a matter of us only having the most recent
25 uses. There is clearly entries before May 25th and entries

Corporal Robert Boggs - Cross (Schles)

1 after May 25th?

2 **A.** Yes, sir.

3 **Q.** So your analysis would indicate that the Tor browser
4 was not used on May 25th, 2019, to access the dark web,
5 correct?

6 **A.** No, sir. That's --

7 **Q.** How do you explain it?

8 **A.** How do I explain it, it's from the operating system.
9 These are the records -- I can just testify to the recovery
10 of the data. I cannot testify to the exact operation and
11 actions of that operating system.

12 **Q.** So your testimony is not exact and 100 percent
13 accurate, correct?

14 **A.** No, everything I said is absolutely the truth and
15 accurate.

16 **Q.** Well, then, how do you explain the discrepancy between
17 Mr. Fleener testifying under oath that some unidentified
18 foreign agent told him that this --

19 MR. HEINRICH: Objection, Your Honor.

20 BY MR. SCHLES:

21 **Q.** -- computer was used on --

22 MR. HEINRICH: Objection, Your Honor.

23 BY MR. SCHLES:

24 **Q.** -- May 25th --

25 THE COURT: Well, let him finish the question and

Corporal Robert Boggs - Cross (Schles)

1 hold your answer until I get to rule.

2 Ask your question again.

3 BY MR. SCHLES:

4 **Q.** Can you explain why Agent Fleener testified that he was
5 told by an unidentified foreign agent that this computer
6 that you examined was used with the Tor browser on May 25th,
7 2019, but it doesn't show up in your report?

8 **A.** I cannot --

9 THE COURT: Hold, hold, hold.

10 Objection is what?

11 MR. HEINRICH: Your Honor, my objection is to this
12 witness being cross-examined regarding what a different
13 witness may have said in the trial. I would argue that's
14 improper.

15 THE COURT: He's offered as an expert witness and
16 is testifying about his opinions about how this operates.
17 And I think this goes to his understanding of the
18 operability and the functioning of the computer and I will
19 allow it.

20 Overruled.

21 BY MR. SCHLES:

22 **Q.** Do you remember the question?

23 **A.** Repeat it, please.

24 THE COURT: Do you want to read it back?

25 MR. SCHLES: That would probably be better, Your

Corporal Robert Boggs - Cross (Schles)

1 Honor.

2 Thank you.

3 ("Can you explain why Agent Fleener testified that he
4 was told by an unidentified foreign agent that this computer
5 that you examined was used with the Tor browser on May 25th,
6 2019, but it doesn't show up in your report?")

7 THE WITNESS: I cannot explain that, no.

8 BY MR. SCHLES:

9 **Q.** Thank you.

10 And you also testified to finding images that are
11 classified as child pornography in, quote, the unallocated
12 space, correct?

13 **A.** That's correct.

14 **Q.** You can testify that you found them in the unallocated
15 space when you conducted the examination, correct?

16 **A.** They were found in unallocated space and in the thumbs
17 DB cache, yes.

18 **Q.** You cannot testify as to when those images were first
19 brought to that computer, can you?

20 **A.** No, sir. No, sir.

21 **Q.** You can't testify as to how they were brought to that
22 computer, can you?

23 **A.** No, sir.

24 **Q.** You can't testify as to when they were moved, if they
25 were moved, correct?

Corporal Robert Boggs - Cross (Schles)

1 **A.** Correct.

2 **Q.** All you can testify to is that you found them in the
3 unallocated space on the computer on the day that you
4 examined the computer.

5 You can't testify to anything more than that, can you?

6 **A.** That's correct.

7 **Q.** And you've already testified that the unallocated space
8 is the type of thing that's not easily accessed to your
9 average computer user, correct?

10 **A.** It -- well, you can access it with special software and
11 programs, sure.

12 **Q.** That's what you do. You use proprietary software. You
13 don't go -- you don't -- I mean, I know a little bit about
14 this stuff. No one here as much as you.

15 You can make the hidden files visible. There's a
16 toggle in Windows, correct?

17 **A.** It's not a hidden file, sir. There's a difference
18 between a hidden file and a deleted file.

19 **Q.** So it's even harder to do than that, isn't it?

20 **A.** Yes. You would have to carve -- basically the way the
21 carving process works with the forensic software is it takes
22 the unallocated space, it looks for the file header, the
23 file footer. When I say the header and the footer, for
24 example, if it's a JPEG file, all JPEGs have the same
25 header: FF D8, FF D9.

Corporal Robert Boggs - Redirect (Heinrich)

1 Q. As you testified, you're highly trained in this area,
2 correct?

3 A. I would think so, yeah.

4 Q. We just literally decided you're an expert on this,
5 correct?

6 A. Yes. I know how it works, yes.

7 Q. And you're a very experienced expert. You've been
8 doing this for years and years?

9 A. Yes, sir.

10 Q. And you use proprietary software that you purchased or
11 your agency purchased for a lot of money, correct?

12 A. Yes.

13 Q. And that's the only way you were able to locate these
14 images in the unallocated space and even with all that you
15 can't say how they got there, can you?

16 A. No. I cannot say how they got there, no.

17 MR. SCHLES: I have no further questions, Your
18 Honor.

19 THE COURT: Redirect.

20 **REDIRECT EXAMINATION**

21 BY MR. HEINRICH:

22 Q. Corporal, the report that you were shown by the defense
23 attorney, that's a screen that lists the top URLs that were
24 found, right?

25 A. Yes. That's I believe some of them, yes.

Corporal Robert Boggs - Redirect (Heinrich)

1 **Q.** And, in fact, it's like some internet pages, the first
2 100 are shown and then you need to click to go onto the next
3 100, right?

4 **A.** Yes.

5 **Q.** So what you were shown that had 100 was page 1 of many,
6 correct?

7 MR. SCHLES: Objection --

8 **A.** I don't know.

9 MR. SCHLES: -- Your Honor.

10 **A.** I don't know.

11 MR. SCHLES: He testified on cross that he
12 couldn't say --

13 THE WITNESS: I can't --

14 THE COURT: Whoa, whoa, whoa. I heard you.
15 Sustained. Leading.

16 MR. HEINRICH: Your Honor, may I approach?

17 THE COURT: Yes.

18 MR. HEINRICH: May I approach, Your Honor?

19 THE COURT: You may.

20 BY MR. HEINRICH:

21 **Q.** Corporal, do you recognize that disc that I just handed
22 you?

23 **A.** Yes. It's a copy of the -- Mr. Dugan's report.

24 **Q.** And your initials are on that?

25 **A.** Yes. I burnt this CD, yes.

Corporal Robert Boggs - Redirect (Heinrich)

1 **Q.** And is that a fair and accurate copy of the report that
2 you were cross-examined on?

3 **A.** Yes.

4 MR. HEINRICH: Your Honor, at this point I would
5 ask that Government's Exhibit Number 10 be introduced.

6 MR. SCHLES: No objection, Your Honor.

7 THE COURT: It may be received.

8 **GOVERNMENT EXHIBIT NUMBER 10 ADMITTED**

9 MR. HEINRICH: Thank you, Your Honor.
10 May I approach again?

11 THE COURT: You may.

12 MR. HEINRICH: Thank you.

13 THE COURT: Don't forget to give it to the
14 courtroom deputy.

15 MR. HEINRICH: Yes, Your Honor.

16 First we're going to attempt to display it for the
17 jury, so if we could display what's been admitted as
18 Government's Exhibit 10.

19 THE COURT: It has been.

20 Yes, you may.

21 BY MR. HEINRICH:

22 **Q.** So, Corporal, if you don't mind looking near the bottom
23 of the screen where it says page and one and then a down
24 arrow?

25 **A.** Yes, sir.

Corporal Robert Boggs - Redirect (Heinrich)

1 Q. And then after that it says 1 to 100?

2 A. Yes, sir.

3 Q. What do those buttons do?

4 A. Those buttons navigate you from page to page. What it
5 would seem to appear at this point that that was just page 1
6 that was printed. However, if you look at the final number
7 1,543, that would be the number of items or URLs in this
8 case that are being listed.

9 Q. And --

10 A. So it was 1,543.

11 Q. So 1,543 is the number of URLs that you found during
12 your analysis of the hard drive?

13 A. Yes, of Onion URLs -- web -- dark web URLs.

14 Q. Excuse me. Thank you.

15 MR. HEINRICH: Your Honor, I have no additional
16 questions.

17 Thank you, sir.

18 THE COURT: All right. Thank you very much.

19 May the witness be excused?

20 MR. SCHLES: Yes, Your Honor.

21 THE COURT: All right. Thank you, Corporal.

22 You're excused.

23 Call your next witness.

24 MS. WHITE: Your Honor, if I may provide the
25 stipulation that is Exhibit 8 to the jury and read it to

1 them at this time.

2 THE COURT: You may.

3 Ladies and gentlemen, I take it that the Assistant
4 United States Attorney is going to read an agreement between
5 the parties as to the existence of a particular fact. You
6 may consider that as evidence of that fact and give it just
7 such weight as you think it deserves.

8 MS. WHITE: Thank you, Your Honor.

9 And to the extent that I didn't do this, I would move
10 Government's Exhibit 8 into evidence.

11 THE COURT: It's admitted.

12 **GOVERNMENT EXHIBIT NUMBER 8 ADMITTED**

13 MS. WHITE: And this joint stipulation says,

14 The United States and the defendant hereby stipulate
15 and agree to the following:

16 The individuals depicted in the images contained in
17 Government's Exhibit 3 through 6 are real people known to
18 law enforcement.

19 The individuals depicted in the images contained in
20 Government's Exhibit 3 through 6 were under the age of
21 18 years when the images and videos were produced and
22 manufactured.

23 The images and videos depicted in Government's
24 Exhibits 3 through 6 depict sexually explicit conduct.

25 The images and videos depicted in Government's 3

1 through 6 were produced and manufactured outside the state
2 of West Virginia and therefore have been shipped and
3 transported in interstate or foreign commerce, including by
4 computer.

5 Logan is located in Logan County, West Virginia, and
6 within the Southern District of West Virginia.

7 Signed by the Assistant United States Attorney defense
8 counsel and the defendant.

9 Your Honor, may I --

10 THE COURT: Ladies and gentlemen, that is a
11 stipulation of fact entered into by agreement between the
12 defendant and the United States.

13 You may consider that as evidence.

14 MS. WHITE: Your Honor, may I approach the clerk?

15 THE COURT: You may.

16 MS. WHITE: Thank you, Your Honor.

17 The government's records reflect that Exhibit 1, 2A
18 through E, and 3 through 10 have been received into
19 evidence.

20 Is that the Court's recollection as well?

21 THE COURT: Madam Clerk.

22 THE COURTROOM DEPUTY CLERK: I have Number 9 as
23 admitted.

24 MS. WHITE: Yes, ma'am. Thank you.

25 THE COURTROOM DEPUTY CLERK: Yes. All right.

1 MS. WHITE: Given all that, Your Honor, the
2 government rests.

3 THE COURT: All right.

4 Ladies and gentlemen, the government having rested
5 their case we'll take our afternoon recess now and then
6 we'll pick up from there.

7 During the recess don't discuss the case among
8 yourselves or permit anyone to discuss it with you. It's
9 not time yet. Don't use any social media, don't do any
10 research, just have a donut or something and I'll call you
11 back in a few minutes.

12 Would you show them to the jury room, sir.

13 (Jury out at 2:46 p.m.)

14 THE COURT: Mr. Schles.

15 MR. SCHLES: Yes, Your Honor.

16 At this time pursuant to Rule 29 of the Rules of
17 Criminal Procedure I would move for a judgment of acquittal.

18 I believe even viewed in the light most favorably to
19 the government and drawing all inferences in favor of the
20 government that the government has failed to establish the
21 intent of knowing access or intent to view material that is
22 child pornography.

23 And what we have is we have evidence that an
24 unallocated space, which by the government's own evidence is
25 difficult to access and find, that images containing child

1 pornography are found. It's the only location on the
2 computer that it was found.

3 They cannot, Corporal Boggs testified, state how it got
4 there, when it got there, who caused it to get there. They
5 haven't shown anyone's knowledge and intent, let alone my
6 client's, Your Honor.

7 THE COURT: All right.

8 Ms. White.

9 MS. WHITE: Thank you, Your Honor.

10 I believe the government has several elements to meet
11 and in the light most favorable to the government we've met
12 those elements.

13 THE COURT: Let's take it to the defendant.

14 Light most favorable to the defendant.

15 MS. WHITE: All right, Your Honor.

16 We have four elements. We'll start with the image
17 traveled in interstate or foreign commerce, including a
18 computer.

19 We've stipulated to that in Exhibit 8.

20 The fact that the children in the images are
21 prepubescent, I think the Court can make that finding from
22 reviewing Exhibits 3 through 6 that were previously
23 published to the jury.

24 And that leaves us with the defendant accessing with
25 the intent to view images of child pornography and knowingly

1 doing that. The evidence to support that comes from several
2 sources: The 1,237 images of child pornography that were
3 recovered from the defendant's hard drive. That comes from
4 Exhibit 9 and the testimony of both Corporal Boggs and
5 Agent Fleener.

6 In addition, the defendant's statement on the video, I
7 was trying to figure it out, coupled with these quotes from
8 his statements to Agent Fleener, quote, trying to figure it
9 out; quote, looking what's happening; quote, probably more
10 than a month or two; quote, I've looked around; quote, I
11 just kind of searched different things until I found
12 something; quote, curiosity got me.

13 Your Honor, that Shimcashe report shows that the dark
14 web -- the Tor browser was used 1,500 times to access --

15 I'm sorry. The report shows that from January to
16 November of 2019 the Tor browser was executed multiple
17 times. That, combined with Government's Exhibit Number 10,
18 shows that the dark web was accessed over 1,500 different
19 websites. When you take that information, coupled with the
20 defendant's statements saying he used the dark web to search
21 for these images, that's more than sufficient evidence to
22 show that the defendant knew that he was looking for child
23 pornography and that he viewed it on the dark web using that
24 PNY hard drive and that computer.

25 So for those reasons we would ask that Rule 29 be

1 denied.

2 THE COURT: I think it's in the light most
3 favorable to the nonmoving party. So to the extent I
4 confused anybody, you can amend your arguments. I perfectly
5 understood what you had to say.

6 MR. SCHLES: Your Honor, I don't have anything to
7 add at this time.

8 THE COURT: All right.

9 Sorry about that.

10 It is the Court's assessment, viewing the evidence
11 properly, that the government has abundant evidence of
12 guilt.

13 The defendant's statements offered very persuasive
14 evidence of guilt. The forensic evidence corroborates the
15 conclusions to be drawn from those statements. I just don't
16 have any doubt about this motion.

17 The motion's overruled.

18 Do you want to take about ten minutes before we pick
19 up?

20 You want to preview for me what you're going to do,
21 Mr. Schles?

22 MR. SCHLES: Yes, I would like to consult with my
23 client during the break, Your Honor.

24 THE COURT: All right. Well, I don't want to call
25 the jury back in until I know what you're going to do. If

1 you don't mind, you can tell me.

2 MR. SCHLES: That's fine, Your Honor.

3 THE COURT: All right. I'll be back at 3:00.

4 (Recess taken from 2:51 p.m. until 3:32 p.m.)

5 (Proceedings held before the jury entered the
6 courtroom.)

7 THE COURT: Have the parties had an opportunity to
8 look at the proposed jury charge?

9 MS. WHITE: Yes, Your Honor.

10 THE COURT: Do you have any objections?

11 MS. WHITE: No, sir.

12 MR. SCHLES: Your Honor, I do have -- I -- on the
13 elements instruction, I think changes are necessary. And
14 also I would like to -- and I assume the Court is going to
15 do this after closing arguments -- some of my proposed
16 instructions incorporated.

17 THE COURT: All right. Well, let's go over it
18 then.

19 Tell me on the elements what page or what's your
20 problem.

21 MR. SCHLES: On the bottom of page 4, beginning
22 with the -- I guess it's the paragraph numbered 4.

23 THE COURT: Uh-huh.

24 MR. SCHLES: Your Honor, in this case the
25 indictment does not include the possession. It simply

1 states that the defendant did knowingly access with intent
2 to view material that is computer graphic images containing
3 images of child pornography.

4 The statute itself have -- there are two methods of
5 violating the statute.

6 THE COURT: Any objection to removing possessed or
7 and just simply saying that the defendant accessed?

8 MS. WHITE: No, Your Honor.

9 THE COURT: I'll take that out.

10 MR. SCHLES: And also, Your Honor, because the
11 indictment specifically -- excuse me -- contained the
12 language that the images involve prepubescent minors, I
13 believe that needs to be added in as part of the elements of
14 the offense the government's alleging and it needs to prove
15 it.

16 MS. WHITE: Your Honor, we see where it is
17 included in instruction 4A of the elements.

18 THE COURT: Yeah, it says it right there.

19 MS. WHITE: And then on page 6 we see where the
20 Court has defined and explained what prepubescent minor
21 means.

22 THE COURT: Yeah. Right at the bottom of page 4,
23 Mr. Schles, the last two words on the page.

24 MR. SCHLES: Yes, Your Honor. I missed that.

25 Thank you.

1 THE COURT: Okay. Do you have anything else?

2 MR. SCHLES: Other than incorporating some of my
3 proposed instructions --

4 THE COURT: Tell me what -- I take it you want to
5 object to my refusal to give some particular instruction of
6 yours?

7 MR. SCHLES: I'm sorry?

8 THE COURT: You want me to -- you want to object
9 to my refusal to give --

10 MR. SCHLES: Yes, Your Honor. Yes, Your Honor.

11 THE COURT: -- some particular instructions?

12 MR. SCHLES: I do.

13 THE COURT: Okay. 15 minutes each side good
14 enough?

15 MR. SCHLES: It is for me, Your Honor.

16 THE COURT: Okay.

17 MR. SCHLES: Your Honor, I would object to the
18 refusal to give defendant's proposed instruction
19 number four.

20 THE COURT: Let me do them one at a time.

21 MS. WHITE: Your Honor, if I could just clarify,
22 is this from ECF filing 57 or 85?

23 THE COURT: That's not it. That's number one.
24 We're looking for number four here.

25 What page number was it, Mr. Schles?

1 MR. SCHLES: It would be number 17 in docket entry
2 57, Your Honor.

3 THE COURT: Credibility, is that the one?

4 Wait a minute. These pages that I have I believe were
5 numbered by you. The whole set is numbered -- has numbered
6 pages; is that right?

7 MR. SCHLES: Yes, Your Honor, but --

8 THE COURT: Point me to a page.

9 THE LAW CLERK: Page 17, Judge.

10 THE COURT: Instruction number four on page 17; is
11 that right?

12 MR. SCHLES: Correct, Your Honor.

13 THE COURT: Hang on. I think that's a totally
14 unnecessary instruction. I will deny it.

15 MR. SCHLES: Please note my objection, Your Honor.

16 THE COURT: I will do so.

17 Defendant's proposed instruction number four is denied.
18 The proposed instructions will be made part of this charge
19 conference record.

20 Go ahead.

21 MR. SCHLES: Also defendant's proposed instruction
22 number eight on page 21. It's a mere presence instruction.

23 THE COURT: On page what?

24 MR. SCHLES: 21, Your Honor.

25 THE COURT: I'm going to deny the instruction. I

1 feel like the Court's charge as written sufficiently covers
2 the law of this case and that there is nothing in the
3 evidence that would require a mere presence instruction.

4 MR. SCHLES: Please note my objection, Your Honor.

5 THE COURT: Yes.

6 MR. SCHLES: Also, defendant's proposed
7 instruction number nine, inferences permissible from failure
8 to produce evidence, on page 22.

9 THE COURT: Again, Mr. Schles, I don't think it
10 will aid the jury to give them this instruction, the proper
11 instruction of the law, but I don't know of any witnesses
12 that would -- can you tell me why you think this is
13 necessary?

14 MR. SCHLES: Your Honor, as was testified, the
15 original identification of Mr. Dugan's ISP internet service
16 provider was relayed from a foreign law enforcement agency
17 to HSI Boston and then to Fleener. The government did not
18 call anyone from this foreign law enforcement agency or the
19 person who received the tip from this foreign law
20 enforcement agency.

21 THE COURT: Based on that objection as stated, I
22 overrule it.

23 MR. SCHLES: Please note my objection, Your Honor.

24 THE COURT: That's number nine that's overruled.

25 Anything else?

1 MR. SCHLES: Just one moment, Your Honor.

2 Your Honor, I believe my other proposed instructions
3 are adequately included in the Court's charge. That is it
4 for my objections.

5 THE COURT: All right. Thank you, Mr. Schles.

6 I am going to include your entire set of proposed
7 instructions with the record noting the ones that I've ruled
8 upon that you've raised as objections.

9 MR. SCHLES: And one other thing, Your Honor, and
10 it's a minor matter and I'm not sure whether it was intended
11 or not, the jury verdict form is titled "Order."

12 Typically when I've seen them they're --

13 THE COURT: That's a mistake. We'll fix it.

14 Madam Clerk, would you file this as part of the record
15 in the case.

16 Let me look at that.

17 Anything else?

18 MR. SCHLES: No, Your Honor.

19 THE COURT: I think -- I assume you would renew --
20 after you announce you rest in front of the jury, you renew
21 your motion.

22 Do you have objection to going ahead and addressing
23 anything additional you want to say since we had your
24 initial motion?

25 MR. SCHLES: I have already stated what I intend

1 to state for the Rule 29 purposes, Your Honor.

2 If it's simply understood that I am renewing the motion
3 and the record reflects that I'm renewing it on the same
4 grounds previously stated, I'm good with that.

5 THE COURT: The record will so reflect. We'll do
6 so after you've rested your case and the Court's ruling will
7 be the same; that is, your motion's overruled.

8 MR. SCHLES: Thank you, Your Honor.

9 THE COURT: Denied.

10 Okay. Ready?

11 MS. WHITE: Yes, sir.

12 THE COURT: Would you bring in the jury.

13 (Jury in at 3:44 p.m.)

14 THE COURT: You can be seated.

15 Ladies and gentlemen of the jury, thank you for that
16 long wait. I think you'll find it's worthwhile. The
17 government having rested, I turn to the defendant. And I've
18 told you before the defendant has absolutely no burden at
19 all.

20 Mr. Schles.

21 MR. SCHLES: Your Honor, at this time the defense
22 rests.

23 THE COURT: The government and the defense having
24 rested, that is the close of the evidence in the case and we
25 will go from there to closing arguments by counsel. After

1 that I'll instruct you on the law and you'll retire to
2 consider your verdict. Each side will have 15 minutes.

3 Who will open for the government?

4 MR. HEINRICH: I will, Your Honor.

5 THE COURT: Very well, sir. You may proceed.

6 MR. HEINRICH: Thank you.

7 Good afternoon.

8 On June 11th of 2020, the police executed a search
9 warrant at the defendant's house. This case is about what
10 they found.

11 You heard they found over 1,000 images of child
12 pornography and you've seen four of those images today.
13 They showed the sexual exploitation, the sexual abuse and
14 the humiliation of young children. I'm not going to make
15 you look at those photos again, but I want you to keep those
16 images in your mind when you're deliberating, when you're
17 considering what this case is about.

18 And this was a quick trial, but I ask do not confuse
19 speed with a lack of evidence. The evidence of the
20 defendant's guilt has been overwhelming. The evidence has
21 shown and proven beyond a reasonable doubt that between
22 January 30th of 2019 and November 4th of 2019, in or near
23 Logan, the defendant knowingly accessed child pornography
24 with the intent to view the material.

25 And you've heard earlier, and I suspect you're going to

1 hear later on, in any criminal trial the burden is on this
2 side of the room. The burden is always on us as a
3 prosecution. We have to prove this case beyond a reasonable
4 doubt. We welcome that burden. We have met that burden in
5 this case and this burden has been met, again, by powerful
6 and overwhelming evidence.

7 And this isn't the type of case where you need to rely
8 upon the word of a stranger or an eyewitness. In this case
9 the evidence is right before you. You can see for yourself
10 what these photos are, what these photos that were found on
11 the defendant's laptop are. And you can hear for yourself
12 the defendant's own words both on the video as well as the
13 interview that he had with Special Agent Fleener.

14 And, again, as part of our burden we have a burden as
15 to every single element of the crime that the judge is going
16 to tell you about. However, in every case some burdens may
17 be more obvious and some may take a little more explanation.
18 And oftentimes there's elements that the parties don't
19 really disagree about.

20 So here's some of the things I don't expect are going
21 to take a lot of thought during the deliberation process.
22 That's because of either the stipulations that we've agreed
23 upon or just because of common sense.

24 So first of all, the stipulations. Again, you heard
25 that's an agreement between the parties. So the stipulation

1 that was read into evidence, first of all, we agree that the
2 children in the four photos you saw are real people and they
3 were under the age of 18.

4 JUROR SHARON BLEVINS: We never saw any photos.

5 THE COURT: I couldn't -- I'm sorry.

6 Just a minute.

7 What did you say?

8 JUROR SHARON BLEVINS: We never saw any photos.

9 THE COURT: What did you say?

10 JUROR SHARON BLEVINS: We never saw --

11 THE COURT REPORTER: I'm sorry. I don't know
12 who's talking.

13 THE COURTROOM DEPUTY CLERK: Judge, she has to
14 take down who was speaking.

15 THE COURT: Okay. I'm sorry.

16 What is your name?

17 JUROR SHARON BLEVINS: Sharon Blevins.

18 THE COURT: All right. The photos were -- that
19 were shown to the jury were six photos; is that correct?

20 MR. HEINRICH: Four, Your Honor.

21 THE COURT: Four photos that she took out of
22 envelopes and showed on the screen.

23 Did you see those?

24 (Jury members indicated no.)

25 THE COURT: The screens didn't display them?

1 (Jury members indicated no.)

2 THE COURT: All right.

3 MR. SCHLES: Your Honor, my screen they were --

4 UNIDENTIFIED JUROR: We didn't see them.

5 THE COURT: I'm very sorry about that. The photos
6 are in evidence and they are in envelopes and they are in
7 evidence before you. I admitted them. You can take them to
8 the jury room and see them.

9 Moreover, you have the disc with what is represented to
10 be other photos should you want to review those as well.

11 All right.

12 MR. HEINRICH: Thank you, Your Honor.

13 THE COURT: Is there objection?

14 MR. SCHLES: No, Your Honor. They were admitted
15 and they can go back to the jury.

16 I don't object.

17 THE COURT: All right. I apologize for the
18 technical problem.

19 Go ahead.

20 MR. HEINRICH: So ladies and gentlemen, I suspect
21 that my colleague Ms. White is going to show those photos to
22 you briefly before you begin your deliberations when she has
23 a chance to speak to you.

24 And in the stipulation the parties also agree that
25 these photos depict what the law calls sexually explicit

1 conduct.

2 Third, the four images were produced outside the state
3 of West Virginia and therefore transported in interstate or
4 foreign commerce.

5 And, lastly, we agree in the stipulation that Logan is
6 in Logan County within the Southern District of West
7 Virginia.

8 What else should not be complicated?

9 Now, we heard that the photos at some point were
10 deleted off the computer. They were in this unallocated
11 space, but we heard that they can still be accessed during a
12 search of the computer using some software.

13 Now, who can access these deleted photos and how easy
14 that is, you don't need to worry about that technical issue
15 because this charge isn't based on whether he possessed them
16 on June 11th. The charge is that the defendant knowingly
17 accessed the child pornography.

18 So you don't have to get sidetracked on exactly what it
19 means to possess photos in this unallocated space. This
20 case is about accessing the photos.

21 What else should not be at issue? When you see these
22 photos, there will be no doubt in your mind that these
23 children are under the age of 12.

24 So there's a lot of things I submit that are just
25 really simple either because you can see them or you will

1 see them with your own eyes or because you can hear them
2 yourself or because the parties have agreed to those facts
3 in the stipulation.

4 So I want to focus right now on how we know the
5 defendant knowingly accessed child pornography with the
6 intent to view it in 2019.

7 First of all, we know it was on his own laptop. It was
8 found in the room right where the defendant told officers
9 they would find it. You saw it in that video that was
10 played. He pointed at that room and that is where it was
11 found.

12 We also heard the officers tell us that appeared to be
13 the defendant's home office and they described for you why
14 they believe that.

15 We also learned during this trial that this type of
16 child pornography is almost certainly accessed through the
17 dark web. We also learned that you can't really find it on
18 the regular internet. You need to use this dark web and to
19 use the dark web it's most often accessed through this Tor
20 browser.

21 And we heard through Corporal Boggs, in Government's
22 Exhibit Number 7, that spreadsheet, that this Tor browser
23 that is used for the dark web was installed repeatedly --
24 excuse me, installed and used repeatedly between January and
25 November of 2019. Those are the dates in the superseding

1 indictment.

2 Now, this is strong evidence that the defendant was
3 accessing child pornography during the period alleged in the
4 indictment.

5 We also heard that over 15,000 dark web sites were
6 visited by the defendant's computer.

7 Now, all of this is powerful --

8 MR. SCHLES: Objection, Your Honor. That's
9 misstating the evidence.

10 THE COURT: It is indeed. I think he didn't mean
11 15,000.

12 MR. HEINRICH: Excuse me. My comma moved.

13 1,500 websites were accessed on the dark web.

14 Now, this is all powerful evidence proving the
15 defendant's guilt.

16 What removes any doubt is the defendant's own words,
17 statements that you heard him make both on the video and in
18 that recorded interview.

19 For example, in the video, when the topic of child
20 pornography was being discussed, he said, quote, it was
21 probably me that figured something out on Tor, some of the
22 statements he made in the audio clips of the interview. In
23 Exhibit 2A he was asked if he's ever downloaded child
24 pornography.

25 No, not that I can ever recall specifically downloading

1 other than going on, looking what's happening.

2 Looking what's happening. When you're considering that
3 phrase, remember what he was looking at. You're going to
4 see these four photos. This is what the defendant so
5 casually says he was looking at. Keep that in mind. Keep
6 that context in mind.

7 Also in Exhibit 2A:

8 Have you ever been on any other websites that offered
9 child pornography?

10 There's some inaudible comments. Special Agent Fleener
11 confirms he's talking about other websites outside of one
12 website in particular.

13 The defendant says:

14 I would say I have probably come across some, yeah.

15 Again, we heard this isn't -- this child pornography
16 isn't stuff you just come across like a broken umbrella on
17 the street. This is stuff you have to get a special browser
18 for, you need to hunt down on the dark web for. And these
19 photos that you're going to see they're going to stick in
20 your mind.

21 And, again, this isn't something you just casually come
22 across.

23 In clip 2B the defendant says:

24 Oh, no, a -- a search engine and just kind of searched
25 different things until I found something and then -- I don't

1 know -- moved -- clicked onto the next.

2 So he's looking at these and he's clicking on --
3 clicking and looking at more.

4 And, again, when you put this together with these
5 images you're going to see, that is powerful evidence that
6 the defendant knew exactly what he was doing and he was
7 going out and seeking these photos of child pornography.

8 In Exhibit 2D the defendant says:

9 I don't know.

10 Yes or no?

11 I can't be sure, but I would say I would -- I would
12 assume I probably made it to more than one.

13 And he's talking about a website.

14 Again, look at these photos. Ask yourself after seeing
15 one what does it tell you that the defendant kept looking
16 for more on one or more websites?

17 That tells everything you need to know about his
18 knowledge and about his intent.

19 When Agent Fleener asked what -- what had you been
20 looking -- sorry -- what had you looking at child porn --
21 and this is in Exhibit 2E.

22 The defendant says:

23 Probably just wondering what -- what in the world is
24 all of it.

25 Again, when you look at these photos, ask yourself is

1 that what comes to your mind, curious what it's all about?

2 And the last exhibit I wanted to mention was
3 Exhibit 2E. And, again, the defendant is trying to explain
4 why he's looking at child pornography.

5 No, I just -- you know, just curiosity. You got me, I
6 guess. I don't -- I don't -- I don't know.

7 Agent says:

8 All right.

9 The defendant:

10 Yeah. I mean, I guess my curiosity pushed me into
11 something I should have steered clear of.

12 THE COURT: That's about -- we had an
13 interruption, but you're about ten minutes even with the
14 interruption.

15 MR. HEINRICH: Okay, Your Honor.

16 So, again, keep in mind what these photos that he's
17 talking about are. These aren't photos you can find in a
18 normal web browser. These are photos you have to hunt out.
19 It's not like checking a score on the internet, checking the
20 weather. These are things you need to seek out -- things
21 you need to seek out.

22 The defendant had to be fully committed to this crime
23 to access these photos you're going to see.

24 And as much as he tried in these -- in this recorded
25 interview to make it sound like it wasn't a big deal, this

1 is a big deal. And you're going to see that when you see
2 these four photos that Ms. White shows you later on this
3 afternoon.

4 Ladies and gentlemen, the defendant is guilty. After
5 carefully reviewing all of the evidence during
6 deliberations, we ask that you come back with the only
7 verdict supported by your common sense and by the evidence
8 in this case, that's a finding of guilty on the sole count
9 of the indictment.

10 Thank you.

11 THE COURT: Mr. Schles.

12 MR. SCHLES: Thank you, Your Honor.

13 The judge has already told you and he will instruct you
14 again that the government has the burden to prove every
15 element of the offense beyond a reasonable doubt. The
16 government has not done that.

17 The government presented two witnesses. Mr. Fleener
18 testified, among other things, that he received essentially
19 a third-hand tip that originated with a, quote, foreign law
20 enforcement agency.

21 You notice that they didn't tell you what this foreign
22 law enforcement agency is. Mr. Fleener admitted he doesn't
23 even know who -- not only doesn't know the individual, he
24 doesn't know who the individual is. They want you to trust
25 a foreign government that they won't name and an individual

1 that they wouldn't put in -- on the witness stand to answer
2 questions in front of you and we're supposed to take on
3 faith that their tip is accurate.

4 What we do know is that some foreign agent is spying on
5 American citizens and is able to find out what they were
6 doing with their computers. If they can do that, who knows
7 what else they are doing to the computers.

8 MS. WHITE: Your Honor, I am going to object. I
9 normally make it a practice not to, but at this point we are
10 far afield.

11 THE COURT: The objection is sustained. The
12 entire argument with regard to the foreign source is
13 improper.

14 You may proceed.

15 MR. SCHLES: Your Honor, I'm going to object to
16 that ruling.

17 THE COURT: You may.

18 MR. SCHLES: Agent Fleener admitted that the
19 information came from a source that he could not
20 independently verify.

21 He then used normal methods to track -- whenever your
22 internet account -- you can be identified by what's called
23 an ISP number and it's a unique address.

24 We do not contest that the IP address was properly
25 traced back to Mr. Dugan's residence. That's not the issue.

1 The issue is whether the images that were found in --
2 as Corporal Boggs testified in what he called the
3 unallocated space, but as he also testified this is an area
4 of the computer that the average user doesn't know how to
5 access or necessarily even know that it's there.

6 He also testified that he couldn't say when those
7 images were placed there, by whom those images were placed
8 or when they were placed. All he could testify was on the
9 day that he looked at the computer, which was not during the
10 period alleged in the indictment, that images were there.
11 He couldn't tell you that any human being accessed those
12 files. Because they were in the unallocated space, they
13 couldn't have been accessed from there without specialized
14 software. And they're just asking you to assume that at
15 some point my client downloaded those images and then
16 deleted them, but they just said, well, that's what we think
17 happened.

18 Did they offer any proof whatsoever that that is what
19 happened? No, they did not. And their whole case as far as
20 the examination is based on trust us. They want you to
21 trust them and their opinions, but they don't want to
22 explain the full part of it.

23 Then they point you to Mr. Dugan's interview on
24 June 11th of 2020 I believe it was, the day the search
25 warrant was executed. That was the audio interview you

1 heard.

2 Mr. Heinrich makes it sound like those statements were
3 ambiguous, unqualified and clear admissions.

4 You're going to have that recording back with you in
5 the jury room. And I encourage you to listen to it again
6 without the government scripting it and ask yourself is
7 Mr. Dugan talking about child pornography when he's asked
8 about them or is he simply asking -- or answering about the
9 Tor browser, which is not illegal.

10 The Tor browser is not illegal. Going on the dark web
11 is not illegal.

12 He goes like this (indicating).

13 Well, what was the question that was asked? Which
14 computer has the Tor browser. He wasn't answering about
15 child pornography.

16 And in terms of the questions concerning whether he
17 went on the dark website and went to child pornography
18 sites, remember it has to be knowledge and intent.

19 You go on and he says, well, I clicked one thing and I
20 clicked another and I clicked another and I clicked another.

21 You notice the question didn't start with I started on
22 one child pornography site and I went to another. It
23 started with I was on the Tor browser and I just clicked.

24 We've all been on the internet. You know you can
25 click, click, click and you can, in fact, as I told you in

1 my opening statement, end up someplace you didn't intend to
2 do. They didn't show that he intentionally accessed these
3 sites that contained these images.

4 The government's own witnesses testified that they
5 didn't have evidence that they were downloaded. There was
6 no evidence that the browser was even used on May 25th,
7 2019, yet some foreign agent in some country has evidence of
8 it. They don't attempt to even explain these
9 inconsistencies and discrepancies. Something is wrong. The
10 agent who said it was accessed on May 25th, 2019, is wrong
11 or the forensic report is wrong. They can't be reconciled
12 other than one of them is inaccurate.

13 Mr. -- I should say Corporal Boggs also testified that
14 the dates on those things, well, you can't rely on those and
15 they sometimes choke them up or he used words to that
16 effect.

17 Well, if the dates are unreliable, why is any of the
18 rest of it reliable?

19 They want to take a man's liberty away and lock him up
20 and it's like, well, just trust us. The mistakes are
21 immaterial. Don't sweat it.

22 We need to sweat the mistakes that the government makes
23 because if we don't start sweating the government's
24 mistakes, holding them accountable and not just rubber
25 stamping their actions, then we will no longer be a country

1 of a rule of law. And I think we all want to remain where
2 people have a fair day in court with a fair trial with fair
3 evidence with not trying to oversell what you have because
4 this is just the tip -- tip of the iceberg, so to speak,
5 down the road to a police state and it needs to stop. And I
6 ask you to please stop it now.

7 THE COURT: All right. Ms. White.

8 MS. WHITE: Thank you, Your Honor.

9 May I approach the clerk?

10 THE COURT: You may.

11 MS. WHITE: Ladies and gentlemen, in law school
12 they taught us about red herrings. When I would try to
13 explain that to my children, I would say imagine you're
14 walking the dog down the street on Capital Street, which my
15 children do, and Lucky, our dog, sees a squirrel --
16 squirrel. And you guys have all seen those memes on TV
17 where it's a distraction technique.

18 The squirrels in this case or the legalese, the red
19 herrings, are foreign law enforcement agencies and was there
20 any downloading. The government made mistakes or maybe
21 we're turning into a police state.

22 Or maybe we're here because the defendant in this case
23 admitted that he was looking at child pornography, maybe.

24 Maybe it's about a police state. Maybe it's about the
25 downfall of the United States of America or maybe, just

1 maybe, those are the squirrels in this case.

2 You're here today because for nine months during 2019
3 the defendant in this case installed the Tor browser and
4 used it to access the dark web to find child pornography.

5 Now, the defense makes a big deal that Corporal Boggs
6 couldn't tell you who put the images on the computer when,
7 but you know who did tell you who put the images on the
8 computer and when they did it? That man right there with
9 the yellow tie.

10 The defendant told you in his statement he used his
11 computer to look at the child pornography and he did it for
12 months prior to the execution of the search warrant.

13 What better evidence than what the defendant says
14 himself about how and when he committed his crime?

15 Now, Mr. Schles told you that the government didn't
16 prove how the defendant accessed images in unallocated space
17 on the computer. I tell you that's another red herring.
18 That's a squirrel. That's not what this case is about.
19 It's not about how he got into the unallocated space because
20 no one says he got into the unallocated space.

21 What the testimony from Corporal Boggs was was that all
22 the images that you view on your computer on the screen are
23 saved in your temporary internet file. That's what he said
24 in his testimony.

25 And then in Exhibit 2D you heard the defendant say he

1 cleaned everything up.

2 Well, ladies and gentlemen, cleaning up something on
3 your computer means deleting it. And so when the defendant
4 cleaned up his computer and deleted his temporary internet
5 files, they went into the unallocated free space. So that
6 is how they got there.

7 He's not charged with unallocated free space, is he?

8 He's charged with accessing those images and looking at
9 them.

10 Now, the defense attorney says we've all been on the
11 internet and we've gotten lost. No, we haven't. We haven't
12 all gotten on the internet, accessed the dark web and gotten
13 lost looking at 1,237 images of child pornography. We just
14 haven't done that. That hasn't happened to the average
15 American.

16 Now, if you were the defendant who was looking for
17 child pornography, well, then, yes, you would be on the dark
18 web and you would be accessing child pornography.

19 Now, I'm kind of old school and I'm going to show you
20 some photos just on paper really fast because you need to
21 see them to make the determination of the elements in this
22 case.

23 Exhibit 6 from the defendant's computer looks like
24 this.

25 Looking what's happening according to the defendant.

1 In Exhibit 5 is this little girl. It's also found on
2 the defendant's computer.

3 When the defendant was just clicking and clicking one
4 to the next he found this.

5 This is another image from his computer.

6 Curiosity got him.

7 And this is what the defendant found when he was
8 curious and decided that he would keep clicking and keep
9 clicking, 1,543 dark websites, which resulted in 1,237
10 images of child pornography that we were able to recover
11 from the defendant's computer.

12 Curiosity got him and it's your turn to convict him.

13 Thank you.

14 THE COURT: All right.

15 Ladies and gentlemen, now that you've heard the
16 evidence, it's my duty to instruct you on the law. These
17 instructions, combined with the instructions I gave you at
18 the beginning of the trial, must guide your deliberations.

19 I'm going to divide these into three parts. First,
20 general instructions on your duties as jurors; second, a
21 statement of the rules of law that you are to apply in this
22 case; and, third, guidelines for your deliberations and
23 return of a verdict.

24 I'll remind you you are judges of the facts. You must
25 apply the facts as you find them to be to the law as I give

1 it to you in these instructions. You must decide the case
2 based solely on the facts as you find them and the law as I
3 give it to you.

4 You must base your verdict solely upon the evidence
5 presented in this case. The evidence consists of the sworn
6 testimony of witnesses, exhibits, stipulations, and those
7 matters of which I took judicial notice. Well, I didn't
8 take any judicial notice.

9 The following are not evidence. I'll remind you the
10 indictment is a formal method of accusing a defendant of a
11 crime. My statements and rulings are not evidence. The
12 attorneys' statements, arguments and questions and
13 objections and any evidence that I ordered stricken or
14 sustained an objection to are not evidence.

15 If I sustained an objection, you should disregard the
16 question. If I overruled the objection, you are to treat
17 the answer and the question the same way you treat any other
18 question and answer in the trial.

19 You should consider the evidence in this case the same
20 way you consider evidence in making any important decision
21 in your own life. Feel free to use your common sense. Feel
22 free to draw reasonable conclusions based on your common
23 experience.

24 Consider each witness's testimony and whether it's
25 worthy of belief. Feel free to consider each witness's

1 ability to observe the matters testified about, each
2 witness's demeanor, state of mind, motive and intelligence,
3 the effect of the verdict on each witness and whether the
4 testimony of the witness is consistent or inconsistent with
5 other evidence.

6 You may reject all or any part of a witness's testimony
7 if you believe he or she testified falsely on an important
8 matter, but remember two or more persons witnessing an event
9 may see or hear it differently. A recollection or mistake
10 in remembering is not uncommon, especially when you get to
11 be my age.

12 Some of you have heard the terms as I mentioned
13 circumstantial and direct evidence. Remember looking out
14 the window and seeing the snow is direct evidence. It's
15 circumstantial evidence it's cold outside.

16 Consider with caution and weigh with great care any
17 statement, confession, admission, act, omission of the
18 defendant outside of the court and after the alleged
19 commission of the crime. Disregard any such evidence unless
20 you conclude beyond a reasonable doubt that the defendant
21 acted knowingly and voluntarily. Otherwise, give it just
22 such weight as you think it deserves.

23 Unlike other witnesses expert witnesses are, as I told
24 you, allowed to give their opinions regarding technical
25 matters. You can give that testimony just such weight as

1 you believe it deserves.

2 You must presume the defendant innocent of the crime
3 charged. The presumption of innocence alone is enough to
4 acquit the defendant.

5 The government has a burden of proving the defendant's
6 guilt beyond a reasonable doubt. Unless the government
7 proves each and every element of the crime charged beyond a
8 reasonable doubt, you must find the defendant not guilty of
9 this crime. This burden never shifts to the defendant
10 because the law never imposes upon the defendant any burden
11 of proving their innocence. If you view the evidence, after
12 hearing all of it, as reasonably -- reasonably permitting of
13 two conclusions, then you must adopt the conclusion
14 consistent with innocence.

15 The charge alleges that a crime was committed on or
16 about a certain date or days. The government need prove
17 beyond a reasonable doubt only that the offense was
18 committed on a date reasonably near the alleged date or
19 dates.

20 Throughout the remainder I'll use terms to describe
21 mental states required before a defendant can be found
22 guilty of a particular crime. The government must prove
23 those mental states beyond a reasonable doubt.

24 To act knowingly means to act voluntarily and
25 intentionally and not because of a mistake, accident or

1 other innocent reason. In determining whether a person acts
2 knowingly, you must focus on his or her actual knowledge.

3 To act intentionally means to act knowing that what
4 you're doing is against the law and purposefully intending
5 to violate the law.

6 Interstate commerce means train or travel from one
7 state to another. The parties have offered a stipulation
8 which is evidence that these images traveled in interstate
9 commerce.

10 In the superseding indictment, the government has
11 charged two means of violating the statute, that the
12 government accessed computer graphic files containing photos
13 and videos of child pornography. The government must prove
14 beyond a reasonable doubt only one of those means; that is,
15 Mr. Dugan intended to access files containing child
16 pornography or that Mr. Dugan intended to access files
17 containing images containing child pornography, but to
18 return a guilty verdict all 12 of you must agree that the
19 same means has been proved.

20 The superseding indictment charges the defendant as
21 follows:

22 2252A(a) (5) (B) is the law of the United States and it
23 provides any person who knowingly possesses or knowingly
24 accesses with intent to view any material that contains an
25 image of child pornography that has been shipped or

1 transported in interstate or foreign commerce by any means,
2 including by computer, or that was produced using materials
3 that have been mailed or shipped in interstate commerce or
4 affecting interstate or foreign commerce by any means,
5 including by computer, shall be guilty of a crime against
6 the United States.

7 The superseding indictment alleges factually that --
8 alleged facts that say between -- between on or about
9 January 30th, 2019, and on or about November 4th, 2019, at
10 or near Logan, Logan County, West Virginia, and within the
11 Southern District of West Virginia, defendant, Raymond
12 Dugan, did knowingly access with intent to view material,
13 that is computer graphic image files containing images and
14 videos of child pornography, as defined in 18 United States
15 Code Section 2256(8)(A) that involved prepubescent minors
16 and which had been shipped and transported in and affecting
17 interstate or foreign commerce by any means, including by
18 computer.

19 To sustain --

20 THE LAW CLERK: Judge --

21 THE COURT: The specific charge that I need to
22 read to you is the superseding indictment charges the
23 defendant, Raymond Dugan, with accessing with intent to view
24 materials containing child pornography in violation of the
25 statutes I read to you.

1 To sustain its burden of proof, the government must
2 prove the following three essential elements beyond a
3 reasonable doubt:

4 That the defendant accessed with intent to view any
5 material that contained an image of child pornography of a
6 prepubescent minor.

7 Two, that the graphic image file images had been
8 transported in or affecting interstate or foreign commerce
9 by any means, including by computer, or was produced using
10 materials that had been transported in or affecting
11 interstate or foreign commerce by any means, including
12 computer.

13 And that the defendant knew that the visual depiction
14 portrayed child pornography.

15 Child pornography means any visual depiction where the
16 production of such visual depiction involves the use of a
17 minor engaging in sexually explicit conduct. Such visual
18 depiction is a digital image, computer image, or
19 computer-generated image that is or is indistinguishable
20 from that of a minor engaging in sexually explicit conduct
21 or such visual depiction has been created, adopted, adapted
22 or modified to appear that an identifiable minor is engaged
23 in sexually explicit conduct.

24 You'll remember the stipulations in that regard.

25 Sexually explicit conduct means actual or simulated

1 sexual intercourse involving genital-genital, oral-genital,
2 anal-genital or oral-anal whether between persons of the
3 same or opposite sex, bestiality, masturbation, sadistic or
4 masochistic abuse or lascivious exhibition of the genitals
5 or the pubic area of any person.

6 A lascivious exhibition is a depiction which displays
7 or brings to view to attract notice to the genitals or pubic
8 area of children in order to excite lustfulness or sexual
9 stimulation in the viewer.

10 Not every exposure of the genitals is a lascivious
11 exhibition. In making your determination you may consider
12 whether the focal point of the image is on the child's
13 genitals or pubic area, the setting or pose is sexually
14 suggestive, the child is in an unnatural pose or
15 inappropriate outfit considering their age, the child is
16 partially clothed or nude. The image suggests sexual
17 coyness or willingness to engage in sexual activity or the
18 image is designed to elicit a sexual response in the viewer.
19 None of these factors needs to be present for the image to
20 be lascivious. You must determine whether the image is
21 lascivious based on your judgment of its overall content.

22 THE COURTROOM DEPUTY CLERK: Judge.

23 THE COURT: An identified -- what have we got now?

24 THE COURTROOM DEPUTY CLERK: Not all.

25 THE COURT: I said that.

1 THE COURTROOM DEPUTY CLERK: You said none.

2 THE COURT: Not all of these factors need to be
3 present for the image to be lascivious. You must determine
4 whether the image is lascivious based on its overall
5 content.

6 I've got to keep somebody here to make sure I don't
7 skip important words.

8 An identifiable minor who was a minor at the time the
9 visual depiction was created, adapted or modified or whose
10 image as a minor was used in creating, adapting or modifying
11 the visual depiction and who is recognizable as an actual
12 person by the person's face, likeness and other
13 distinguishing characteristics such as unique birthmark or
14 other recognizable feature, and the government is not
15 required to prove the actual identity of the identifiable
16 minor. With regard to those things, you must consider the
17 stipulation.

18 The jury must determine based on all the evidence
19 whether a reasonable viewer would consider the depiction to
20 be of an actual minor. The jury may look at the manner in
21 which the image was marketed to determine whether it's
22 prohibited material.

23 The government has alleged that the images at issue
24 involve a prepubescent minor. A prepubescent minor is one
25 under the age of 12. The government does not need to

1 establish the exact age of the child in the image nor does
2 it need to prove the identity of the child in the image.
3 You may determine that a person is under the age of 12 based
4 on your view of the relevant images.

5 A computer is an electronic, magnetic, optical,
6 electrochemical or other high-speed data processing device
7 performing logical arithmetic or storage functions and it
8 includes any data storage facility or communications
9 facility directly related to or operating in conjunction
10 with such device.

11 Such a term does not include an automated typewriter or
12 typesetter, a portable handheld calculator or other similar
13 device.

14 I'm going to find some way to leave that out the next
15 time.

16 Interstate commerce means travel, trade, transportation
17 or communication from one state to another.

18 The government must show that the images at issue were
19 previously transported from one -- from another state or
20 from another country to the United States or that they were
21 produced using material that previously traveled in
22 interstate commerce.

23 When you retire to your jury room, the exhibits will be
24 sent back with you. You will have them in your jury room.

25 The first thing you'll do is conduct an election.

1 You'll select one of your number to be your foreperson who
2 will preside over your deliberations in court and be your
3 spokesperson.

4 All jurors must agree on a verdict. Your verdict must
5 be anonymous. You must consult with one another and
6 deliberate with the intention of reaching agreement if you
7 can do so without violence to your individual judgment.

8 During your deliberations do not hesitate to reexamine
9 your own views or change your opinion, but do not surrender
10 your views or opinions just to reach a verdict.

11 I've prepared a verdict form for you. When you've
12 reached the anonymous verdict, your foreperson shall fill
13 in, date and sign the verdict form. Let the court security
14 officer know when you've reached a unanimous verdict.

15 If you need to communicate with me in any way, it
16 should be by means of the foreperson of the jury writing me
17 a note and on behalf of the jury and signed by that
18 foreperson. I can tell you right now I'm not going to give
19 you transcripts of witness testimony. If you need to
20 communicate with me, do it that way, but in so doing do not
21 tell me or suggest how the jury stands on the issue before
22 you.

23 At some point you may want to take a break or recess
24 for the day. If you need to do that, just send a note
25 through the bailiff as I just told you.

1 Anything else?

2 Mr. Brohard, you're excused. I think it's the hardest
3 job on the jury. You listen to all this, but you don't have
4 to go back and deliberate, but you do get to go home and eat
5 earlier. You need to leave your notes right there and the
6 courtroom deputy will get rid of them.

7 Thank you very much and I appreciate your service.

8 JUROR MATTHEW BROHARD: Thank you.

9 THE COURT: You're now judges. You have the most
10 serious task that a citizen has to do. Go back and talk
11 among yourselves and deliberate based on the evidence and
12 the law and return a unanimous verdict.

13 Ladies and gentlemen, all rise for the jury.

14 (Jury out at 4:32 p.m.)

15 THE COURT: Any objections to the instructions?

16 MS. WHITE: No, Your Honor.

17 MR. SCHLES: No, Your Honor.

18 THE COURT: Good. All right.

19 Court will be in recess to await the verdict of the
20 jury. Leave word where you are with the courtroom deputy.
21 It's about 4:33. We'll see.

22 MS. WHITE: Thank you, Your Honor.

23 THE COURT: Thank you for a well tried case. I
24 appreciate it.

25 MR. SCHLES: You're welcome, Your Honor.

1 (Recess taken from 4:33 p.m. until 5:09 p.m.)

2 THE COURT: Defendant ready? Defendant ready?

3 MR. SCHLES: Yes, Your Honor.

4 THE COURT: Is the government ready?

5 MS. WHITE: Yes, sir.

6 THE COURT: Mr. Court Security Officer, I
7 understand the jury has reached a anonymous verdict; is that
8 correct?

9 THE COURT SECURITY OFFICER: Yes, sir.

10 THE COURT: Would you bring them in, please.

11 THE COURT SECURITY OFFICER: Yes, sir.

12 THE COURT: What in the world is that?

13 THE COURTROOM DEPUTY CLERK: They're doing
14 construction on seven.

15 THE COURT: How about telling them to stop for a
16 minute.

17 One time I let that go in Parkersburg. I said, oh,
18 they're trying to make a living, and they dropped a trash
19 compacter on top of my car.

20 MR. SCHLES: Do we have a motorcycle up there?

21 THE COURT: I don't know what they're constructing
22 on seven. Judge Johnson may be installing a swimming pool.

23 (Jury in at 5:11 p.m.)

24 THE COURT: You may be seated.

25 Who speaks for this jury as its foreperson?

1 (Indicating.)

2 THE COURT: Mr. Foreperson, the deputy marshal has
3 informed me that you have reached a anonymous verdict in
4 this case; is that correct?

5 JURY FOREPERSON: That is correct.

6 THE COURT: Would you hand your verdict to the
7 court security officer for delivery to me for inspection
8 before publication.

9 Thank you, sir.

10 Before we go on, I would like to thank all of you for
11 your service as jurors in this case. You've performed a
12 valuable service today. I will stop back right after this
13 is over to say hello for any of you that aren't trying to
14 run and catch a bus.

15 Ladies and gentlemen, I will now publish your verdict
16 by asking the clerk to read it aloud in open court. Please
17 listen carefully to the clerk to be sure this is your
18 verdict in all respects.

19 Madam Clerk.

20 THE COURTROOM DEPUTY CLERK: The matter before the
21 Court is *The United States of America v. Raymond Dugan*,
22 Criminal Action No. 2:21-cr-127.

23 Verdict: As to the charge of accessing with intent to
24 view material that is computer graphic image files
25 containing images and videos of child pornography that

1 involve prepubescent minors which had been shipped and
2 transported in and affecting interstate or foreign commerce
3 in violation of 18 United States Code Sections
4 2252A(a) (5) (B) and 2252A(b) (2) as contained in the
5 superseding indictment, we the jury find the defendant,
6 Raymond Dugan, guilty.

7 Date: August 2nd, 2022. Signed by the foreperson.

8 THE COURT: Do either of the parties request the
9 jury be polled?

10 MS. WHITE: No, sir.

11 MR. SCHLES: No, Your Honor.

12 THE COURT: Ladies and gentlemen, I accept your
13 verdict.

14 Madam Clerk, please file and record the jury's verdict.

15 Again, thanks for your service. I now excuse you from
16 further service and you may return to your jury room.

17 The Court enters judgment on the -- you may go.

18 (Jurors excused from the courtroom.)

19 The Court enters judgment based on the jury's verdict
20 as to the charge in the superseding indictment. Mr. Dugan
21 is adjudged guilty of violating 18 United States Code
22 Sections 2252A(a) (5) (B) and 2252A(b) (2).

23 I direct the defendant to make post-trial motions in
24 writing within seven days.

25 The probation office is to prepare a draft presentence

1 report, disclose it to the government and the defendant no
2 later than September 15.

3 Objections will be due September 29th.

4 The final report will be due October 13.

5 Sentencing memoranda due October 20th.

6 The Court schedules final disposition for this matter
7 on October 27th, 2022, at 10:00 a.m.

8 The defendant stands convicted of a violent crime. As
9 such the Bail Reform Act of 1984 requires me to detain him
10 unless there's substantial likelihood he's not likely to
11 flee or pose a danger to any other person or the community
12 if released.

13 What's the government's position concerning release?

14 MS. WHITE: Your Honor, our interpretation of the
15 statute is that he would have to not be a danger and we
16 would have to be recommending no jail time. We are not
17 making any such recommendation at sentencing, so we believe
18 detention pending the next hearing would be appropriate.

19 MR. SCHLES: Your Honor, I would ask my client be
20 released on the same bond with the same conditions pending
21 sentencing. He has no prior criminal record. He's been
22 100 percent compliant on an extended period on bond. I
23 don't believe he poses any danger to the community. He has
24 substantial community ties, his family, he's employed. I
25 think he should be allowed to remain free on bond pending

1 sentencing, Your Honor.

2 THE COURT: I agree with Ms. White's reading of
3 the law. I find that the defendant should be detained
4 awaiting sentencing. I don't believe there are any
5 exceptional circumstances existing why he should not be. I
6 order you detained by the United States Marshal.

7 I direct that the person in charge of your confinement
8 make you reasonably available for consultation with your
9 lawyer and upon request of an attorney for the United States
10 or an order of a Court for the United States deliver you
11 here for the purpose of a court proceeding.

12 Anything further to come before the Court at this time?

13 MS. WHITE: No, Your Honor.

14 Thank you.

15 MR. SCHLES: No, Your Honor.

16 THE COURT: Court's adjourned.

17
18
19 (Proceedings concluded at 5:16 p.m., August 2, 2022.)
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23
24
25

1 CERTIFICATION:

2 I, Kimberly Kaufman, Official Court Reporter, certify
3 that the foregoing is a correct transcript from the record
4 of proceedings in the matter of United States of America,
5 Plaintiff v. Raymond Dugan, Defendant, Criminal Action No.
6 2:21-cr-00127, as reported on August 2, 2022.

7
8 s/Kimberly Kaufman, RMR, CRR, CRC

January 16, 2023

9 Kimberly Kaufman, RMR, CRR, CRC

DATE